89-670

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

———

LARRY ZAPP, *et al.*,
Petitioners

v.

UNITED TRANSPORTATION UNION,
Respondent

———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

———

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QUESTIONS PRESENTED FOR REVIEW

I. Was there a material issue of fact or law as to when the statute of limitations began to run against Petitioner's duty of fair representation claim against Respondent, which was brought six (6) years before *Del Costello*, 462 U.S. 151 (1983), 103 S. Ct. 2281, 76 L. Ed. 2d 476, was decided by this Court and made retroactive by the Seventh Circuit Court of Appeals in *Landehl v. P.P.G. Industries, Inc.*?

II. Was there material issue of fact or law as to whether the Doctrine of Equitable Estoppel and Equitable Tolling should apply against Respondent's defense of statute of limitation when it was admitted by the parties hereto that when the December 18, 1975 Multiple Party Railroad-Union Collective Bargaining Agreement was signed, concerning the issue if the Petitioner's employer, Indianapolis Union Railway Co., an independent subsidiary railroad of Penn Central, would even be included in the collective bargaining terms and conditions and Petitioners be thus affected by its terms and conditions.

III. Whether the Seventh Circuit Court of Appeals' decision in this matter conflicts with an applicable decision of this Court as to when the *Del Costello's* retroactive six (6) month statute of limitations began to run against Petitioner's fair representation claim against Respondent.

IV. Whether the Seventh Circuit Court of Appeals' decision in this matter conflicts with the decision of another Federal Circuit Court of Appeals on the same issue.

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No. ——

LARRY ZAPP, *et al.*,
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v.

UNITED TRANSPORTATION UNION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported under 879 F.2d 1439, and is printed in the Appendix hereto, *infra*, page 1a.

The Memorandum, Decision and Judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, is printed in the Appendix hereto, *infra*, page 7a.

The decision of the Interstate Commerce Commission, under Finance Docket No. 21989, and is printed in the Appendix hereto, *infra*, page 54a. The previous decision of the United States Court of Appeals for the Seventh Circuit reported under 727 F.2d 617 is printed in the Appendix hereto, *infra*, page 29a.

JURISDICTION

The Judgment of the United States Court of Appeals of the Seventh Circuit was entered on July 7, 1989. A timely Petition for Rehearing was denied on July 26, 1989. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Petitioner's duty of fair representation claim was based upon 45 U.S.C. 152 relating to railway labor disputes and further, 49 U.S.C. 11347 which deals with employees protective arrangements and transactions involving rail carriers, and 28 U.S.C. 1336 which relates to an interstate commerce commission order which Petitioner previously requested the District Court to enforce.

STATEMENT OF THE CASE

When the Pennsylvania Railroad merged with the New York Central Transportation Company there was an entity created known as the Penn Central Transportation Company. That the 145 Petitioners herein were all former employees of the Indianapolis Union Railway Company and on February 1, 1968 I.U.R.C. was a wholly owned, though independently operated, subsidiary of the Pennsylvania Railroad.

That prior to the Penn Central merger certain negotiations took place to protect the seniority rights of affected employees of the two (2) railway systems and subsidiaries. These negotiations produced a Collective Bargaining Agreement that granted most employees a February 1, 1968 seniority date on the Penn Central Track. That the Indianapolis Union Railway Company employees, due to its independent status, was not a party to the February 1, 1968 agreement. Thus, said employees, while retaining their original date of hire of seniority on track within the I.U. Territory, did not receive any

seniority date on other Penn Central tracks, a fact that was alleged to have produced inequitable results. Shortly after the merger was effected the I.U. employees retained the UTU as their exclusive bargaining representative.

During the mid 1970's Congress created Conrail, a corporation formed to acquire the assets of several bankrupt railroads, including the Penn Central. That on December 18, 1975 a Collective Bargaining Agreement was signed that defined the seniority rights of employees affected by the pending Conrail Acquisition. Essentially the agreement preserved the seniority status quo for employees throughout the territory of the acquired railroad while granting them a seniority date on other Conrail tracks commensurate with the date of acquisition of their former employer. That it is admitted by the Petitioners and the Respondent, and the District Court, that when the December 18, 1975 Collective Bargaining Agreement was signed it had not yet been determined whether the Petitioners' employer, Indianapolis Union Railway Company, would be included in said December 18, 1975 Collective Bargaining Agreement or remain an independent subsidiary as before.

That on January 24, 1977 seniority rosters detailing the status of former I.U. employees were posted and Petitioners' representative then immediately complained to the Respondent about the inequitable results produced by the Respondent's interpretation of the December 18, 1975 Collective Bargaining Agreement terms, which apparently did apply to Indianapolis Union Railway Company and its employees.

That all of said Petitioners, except two, Rather and Overstreet, all signed affidavits that they had no knowledge that the December 18, 1975 Collective Bargaining Agreement even applied to them or to the Indianapolis Union Railway Company and further signed affidavits that they had no knowledge of the Collective Bargaining

Agreement or its terms until the seniority roster was posted in January of 1977.

That the Petitioners did, on or about January 24, 1977, through their representative, complain to the Respondent of the inequitable seniority status of said Indianapolis Union Railway Employees and requested an administrative hearing to obtain relief for the affected Petitioners herein on January 24, 1977. That a request for internal union relief from Petitioners' representative was forwarded by General Chairman, Overstreet, to Respondent's Vice President, Craigo, which forwarded said demand on to Respondent's International President, Chessar. That on or about March 25, 1977 President, Chessar, directed correspondence to the Petitioners' attorney representative that he disagreed with the Petitioners' position concerning the Respondent's alleged breach of its duty to fairly represent Petitioners concerning their seniority rights, Chessar also made reference to the disgruntled Petitioners herein that the Respondent, Union, would defend themselves in a civil action if Petitioner brought an action against Respondent. The Respondent did not refer the matter to further union proceedings as required under the Union.

That the Local Chairman, Charles O. Baker, did file an affidavit with the District Court stating that he was an agent of Respondent and was not aware that Respondent had negotiated and executed a December 18, 1975 Agreement for engine, servicemen, and train employees, until the later part of 1977. That further, General Chairman, Rather, an agent of the Respondent, stated that based upon President Chessar's correspondence to Petitioners' attorney representative, dated March 25, 1977 there was no doubt in General Chairman Rather's mind that UTU had no intentions of fairly representing the I.U. employees' interest with respect to seniority. That further he swore that various Respondent officials, including President Chessar and Vice President, Burke, had acted

in bad faith in dealing with Petitioners' seniority rights and further that Rather, as a General Chairman of said Respondent, did not become aware of what the Union's position was as to the Petitioners' seniority rights until the actual consolidation of the I.U. facilities with the Penn Central Track in the later part of January, 1977.

Further, Rather was not invited to the Respondent's meeting at which the Respondent's General Chairman elected a committee of five (5) general chairmen to negotiate a system wide seniority plan and further Rather's affidavit did verify when the 1975 Collective Bargaining Agreement was entered into it was not determined yet whether the Indianapolis Union Railway Company would be included in said Collective Bargaining Agreement term or remain independent as before.

Respondent's General Chairman, Russell Overstreet, also signed an affidavit that he represented all I.U. employees, including the Petitioners herein, and stated that he did not know whether the Indianapolis Union Railway employees, would be included in the 1975 Collective Bargaining Agreement. Further, General Chairman, Overstreet, signed an affidavit in the District Court that the Respondent purposely concealed information especially in regard to the Interstate Commerce decision relative to said merger and that he and other Respondent officials did act in bad faith in representing the Petitioners with respect to their seniority rights choosing to favor former New York and Pennsylvania employees of which the Indianapolis Union Railway employees were only a small minority in dealing with the larger, in numbers, New York and Pennsylvania employees.

That after receiving Respondent's President, Chessar's, letter of March 25, 1977, addressed to Petitioners' representative, the Petitioners, on July 12, 1977, did file its claim against the Respondents herein, their duty of fair representation claim in the United States District Court for the Southern District of Indiana.

That the District Court did grant a 12(b) Motion to Dismiss said proceedings after a delay of several years. The Seventh Circuit Court of Appeals did remand the proceedings back to the United States District Court under the decision *Zapp v. UTU, et al.*, 727 F.2d 617 (1984), stating that the Petitioners did have a cause of action against Respondent and gave the Petitioners an election to also seek relief from I.C.C. Declaration Order.

That after remand to the United States District Court Petitioners did petition the Interstate Commerce Commission for a decision for an Order of Clarification concerning the Indianapolis Union Railway Company employees seniority rights under the Penn Central merger. The Interstate Commerce Commission, under Finance Docket No. 21989, issued an order on May 6, 1986 stating that the Indianapolis Union Railway Company was wrongfully left out of the Penn Central merger and should have been treated as a subsidiary of Pennsylvania Railroad and the employees of Indianapolis Union Railway Company should have seniority rights in said Penn Central merger labor agreements. That the Respondent then filed their Motion for Summary Judgment and Petitioners filed opposition thereto and the District Court, on July 20, 1988 entered an order dismissing litigation based upon the *Del Costello* six (6) month statute of limitation doctrine.

On July 20, 1988 the District Court ruled that the Petitioners action against the UTU is barred by the statute of limitations in ruling that the Petitioners had not met the burden necessary to avail themselves of a "discovery" statute of limitations and furthermore the District Court ruled that the undisputed facts indicate that the Petitioners should have discovered the existence of a seniority agreement more than six (6) months prior to the filing of suit. Further, the District Court ruled that the Petitioners had demonstrated no basis for the

tolling of the limitation and granted said Motion for Summary Judgment.

That the United States Court of Appeals for the Seventh Circuit on July 7, 1989 did affirm the decision of the District Court. The Circuit Court stated that each of the individual Petitioners were required to produce evidence demonstrating that they had not discovered the existence of the Collective Bargaining Agreement prior to January 12, 1977, and ruled that none of the Petitioners had produced enough evidence to satisfy the discovery exception issue and affirm the District Court's ruling.

The Circuit Court found that Respondent had sent copies of the Collective Bargaining Agreent to Petitioners' representative by September 1, 1976.

The Circuit Court held that the affidavit was insufficient as submitted by Charles Baker, who was the local chairman of the Respondent, Union. Baker did not learn of the existence of the Collective Bargaining Agreement until the early part of 1977 which the Court held was not sufficient evidence to avoid Summary Judgment on the discovery exception issue.

The Circuit Court stated that the existence of rumors that the Respondent was not adequately representing the interest of the I.U. employees and in view of these rumors the Circuit Court stated that they could fail to see why a diligent employee, who was concerned about his seniority status under Conrail, would not have asked his representatives, who were in possession of the Collective Bargaining Agreement, about the seniority matter. That further, the Circuit Court ruled that Petitioners' contention that statute of limitations was toll due to the Respondent's fraudulent concealment of the existence of the Collective Bargaining Agreement was not a valid argument since the Respondent had sent copies of the Collective Bargaining Agreement to General Chair-

man Overstreet by September 1, 1977. That further, the Circuit Court held that Petitioners limitation period was not tolled while the Petitioners exhausted their inter-union remedies. That Circuit Court finally held that the Petitioners' argument that the Respondent should be estopped from asserting the statute of limitations as a defense was not valid because there was not sufficient facts to show that the Respondent had induced the Petitioners from forebearing suit within the applicable limitation period.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

Jurisdiction rests with the United States District Court for the Southern District of Indiana under 28 U.S.C. 1336, 45 U.S.C. 152, 28 U.S.C. 1331, and 49 U.S.C. 11347, and the Petitioners were, at the time of the filing of the original complaint in this action residents of the State of Indiana or lived in or near Indianapolis, Indiana. All of the Petitioners were either engineers or trainmen, formerly or presently employed by Conrail. Further, all Petitioners were, at all times pertinent, paying members of, and in good standing, in the Respondent, Union.

REASONS FOR GRANTING WRIT

The Petitioners who are, or were former, employees of the Indianapolis Union Railway Company, have since 1968 been denied any seniority rights relative to their prior rights under the Penn Central Merger. That the Petitioners have prior rights on the old Indiana Union Railway Company tracks but do not have prior-prior seniority rights under the Penn Central Collective Bargaining Agreement, accord of February 1, 1968. This results in former Pennsylvania and New York Central employees who have prior-prior rights to out bid the Petitioners and former Penn Central and have superior seniority rights for jobs on the new Conrail seniority districts.

Thus, the inequitable condition did, and does now, exist, whereas, a former Penn Central employee has seniority rights over an Indianapolis Union Railway Company employee who might have fifteen (15) years more seniority within the system than the former Penn Central employee and yet, while bidding under the new Conrail seniority system the former Penn Central employee has superior seniority rights to bid on jobs under the new Conrail seniority system than the former Indianapolis Union Railway employee who has been employed longer than said former Penn Central employee.

The 145 Petitioners have literally lost millions of dollars of lost wages and benefits by not being able to compete with former Penn Central employees under the old Penn Central Consolidated Seniority Rosters and presently under the new Conrail Seniority Rosters which only give the Petitioners prior seniority rights but not prior-prior seniority rights as given to the Penn Central employees.

That the Petitioners did file their cause of action against the Respondent on July 12, 1977. That this Court, in entering its decision in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), did place the fair representation claims on a "fast track" by adopting a six (6) month statute of limitations retroactive prior to 1983, but that *Del Costello, supra*, did recognize the validity of tolling defenses such as equitable estoppel or equitable tolling. That the Seventh Circuit decision held that even though this action was commenced approximately six (6) years before *Del Costello* was decided under *Landahl v. PPG Industries, Inc.*, 746 F.2d 1312 (7th Cir. 1984), that the *Del Costello* ruling was retoractive within the Seventh Circuit. That further, the Seventh Circuit in *Cliff v. UAW*, 818 F.2d 623, 629 (7th Cir. 1987). It further held that they recognized a narrow discovery exception in that in holding the six (6) month statute of limitation period does not begin

to run until the aggrieved party discovers or with the exercise of reasonable diligence could have discovered the existence of the collective bargaining agreement. The Seventh Circuit committed plain error is failing to follow its own prior decisions.

It was conceded by the District Court's opinion and not even addressed by the Circuit Court (it is further conceded by the Respondent), that when the December 18, 1975 Collective Bargaining Agreement was entered into it had not yet been decided by the Respondent and Conrail whether the Indianapolis Union Railway Company would be included in the Conrail Acquisition. That further the facts are undisputed that neither Conrail or the Respondent gave any individual Petitioner any type of notice as to the rights under the former Penn Central Seniority Contract and Implementation Agreement, nor gave any individual Petitioner any type of notice as to the rights relative to any Interstate Commerce decision, more specifically its Sixth Supplemental Report. That further, there is no evidence in the record throughout these proceedings that the Respondent in any way advised the Petitioners of the affect of the December 18, 1975 Collective Bargaining Agreement or even when said Agreement would become effective or what affect it would have upon the Petitioners herein. That as pled in the District Court and as addressed by the Circuit Court, the affidavits of General Chairman Overstreet of the Respondent, Union, and the affidavits of General Chairman Rather, did show not only that the Respondent did not try to assert any of the rights of the Petitioners who were the employees o fthe Indianapolis Union Railway but, in fact, Respondents' General Chairmans, Overstreet and Rather, stated under oath that they did not know nor could have learned of the status of the Petitioners seniority rights during the year of 1976 until the January 24, 1977 seniority rosters were posted detailing the seniority status of the former Indianapolis Union Railway employ-

ees. That further, the record is undisputed that as late as October 8, 1976 that neither President Chessar of the Respondent, Union, nor Vice President, Craigo, of the Respondent, Union, nor General Chairman, Rather or Overstreet, knew when and if Conrail would acquire actual control and management of the Indianapolis Union Railway and whether the Petitioners would receive their seniority dates equivalent with former Pennsylvania, New York, and/or Penn Central employees in the new consolidated seniority district.

The Petitioners argue that if the President of the Respondent, Union, down through the Vice President, and General Chairmans, and through the Local Chairman, did not know or would not disclose any information concerning the Petitioners' seniority status relative to the Conrail Acquisition, then how could the Petitioners (Indiaanpolis Union Railway employees) know, or could possibly learn of their seniority status or of the statute of limitations or know that it was running against them and thus be able to stop the tolling of the statute of limitations by bringing some action against the Union.

It is further undisputed that even the Local Chairman for the engine service employees, Baker, in the year 1976 and 77, was not aware that a December 18, 1975 Seniority Agreement for engine service and train service employees had even been negotiated or signed and it was not until January 1977 that he even learned of said 1977 bargaining agreement when they were read to him by Attorney Richards, in late January, 1977.

That since the consolidated rosters were not posted until January 24, 1977, and since the statute of limitations would not run against Petitioners under the *Del Costello, supra*, Doctrine until Petitioners knew or should have known of their cause of action against Respondent the statute would not have started running until after January 24, 1977 and since their cause of action against the Respondent was filed on January 12, 1977 then the Petitioners did timely file their fair representation ac-

tion against the Respondent, Union, herein within 180 days as Required by *DelCostello.*

That further the Petitioners argue that the statute of limitations was tolled until they discovered or in the existence of reasonable diligence could have discovered the acts constituting the alleged unfair labor representation violations. The Circuit Court did hold that knowledge by a Respondent, Union, representative, namely a General Chairman should be imputed to the general membership of the Union, including the Petitioners herein. The Petitioners argue this is plain error. How can knowledge of the Respondent, United Transportation Union's, General Chairmen, Overstreet and Rather, and the Local Chairman Baker, be imputed to its general membership without some type of communication, whether oral or written. It is conceded by the District Court and Circuit Court (and by the Respondent herein), that no such communication was ever made. It is illogical to hold that a general chairman or a local chairman of a union should, or did have, knowledge of the existence of a Collective Bargaining Agreement, then that knowledge *or lack of knowledge* would be binding on and should be imputed to said union officials' general membership without some type of oral or written communication to the membership including the Petitioners herein. Such is the exact case in this present action.

As stated, said Union officials, General Chairmen, Rather and Overstreet, and Union official Local Chairman, Baker, both signed affidavits that they did not have any actual knowledge or any actual information that the December 18, 1975 Agreement would directly pertain to the Indianapolis Union Railway employees until January 24, 1977 when the new consolidated Conrail Seniority Rosters were posted. Both of the General Chairmen stated in the District Court that they made inquiry but that any information was concealed from them by the Respondent, President and Vice President. Thus, if the General Chairmen of the Respondent, Union, made in-

quiry and could not learn of the existence of the status of Petitioners' seniority rights how could the alleged lack of diligence by said Union official be imputed to the general membership and to the Petitioners herein. The Petitioners argue that manifest error has occurred in this matter and that this Court should grant a Writ of Certiorari to correct said plain error.

That further, after learning that when the Consolidated Seniority Rosters for the new Conrail seniority district was "posted" and it clearly showed that former Penn Central employees had superior seniority rights over former I.U. Territories and did not give former I.U. employees rights over former Penn Central Territory.. Former Penn Central employees were given February 1, 1968 seniority rights on all territory within said seniority district while the Indianapolis Union Railway employees only received seniority rights as of April 1, 1976 on said seniority territorial districts. That as stated Petitioners were given prior rights, but no prior-prior rights as given former Pennsylvania employees. As admitted in the District Court's Judgment Entry on Page 13, Paragraph 2, the District Court stated:

> "As stated before, the parties to this action were not certain, at the time the seniority agreements were signed (December 18, 1975), that I.U. (Indianapolis Union Railway Employees) would become part of Conrail."

Thus, since none of the Petitioners nor the Respondent, Union's, Local Chairman or General Chairman, did not participate in the negotiations of the December 18, 1975 Agreement how could the Petitioners know or have any way of knowing as to whether they would have prior-prior rights if it would be decided after December 18, 1975 that Indianapolis Union Railway Employees would become part of the Conrail seniority districts.

The Petitioners further argue that even if they had discovered the existence of the December 18, 1975 Col-

lective Bargaining Agreement, (and there is no proof in the record, whatsoever, that they had) even the reading of said December 18, 1975 Collective Bargaining Agreement would not show what their seniority rights were. That further, an argument can be stated that the Collective Bargaining Agreement could very well have been interpreted differently by the Respondent and Conrail and the Petitioners could very well have received the February 1, 1968 seniority rights from a literal reading of the Collective Bargaining Agreement versus the limited rights that they did receive as of August 1, 1976 through the posting of the Conrail Consolidated Rosters on January 24, 1977 since the agreement is vague and Apparently the decision to not give Petitioners prior-prior rights was not made until the posting of the January 24, 1977 consolidated Seniority Roster.

That the Petitioners further argue that the lower court's opinion statement that September 1, 1976 is the target date that the Petitioners should have filed the law suit within 180 days thereof is also without merit and should be reversed because within 180 days of the September 1, 1976 artificial target date, set up by the lower court that, in fact, the Petitioners attempted to exhaust their inter union remedies which clearly tolled the statute. On January 24, 1977 the request for arbitration was made by Petitioners for a hearing with the Union concerning their seniority rights. It aws filed by Petitioners' legal representative to the General Chairmen, Overstreet and Rather. That when Rather and Overstreet did not respond thereto a further request was made by the Petitioners' legal representative directly to the President of the Union, Chessar, who basically wrote back and denied that the Respondent had violated any of the Petitioners' rights and, in fact, said "sue us".

In the case of *Dement v. Richmond, Fredricksburg, & Pennsylvania Railroad Company*, 345 F.2d 451, 4th Cir., that Circuit did hold differently than the Seventh Circuit concerning exhaustion of inter union remedies. The Court

held "generally speaking a cause of action for breach of duty of fair representation accrues at the point where the grievance has been exhausted or otherwise *breaks down to an employees disadvantage.*" (Emphasis added). "It is only at this point that an employee is cognigent of any alleged breach of the duty owed him by the Union."

That said *Dement, supra,* decision also cites *Hayes v. Reynolds Metal Company,* 769 F.2d 1520 (11th Cir. 1985) (per curiam). That the Sixth Circuit held simultaneously in *Atkinson v. International Union of Electrical Radio and Machine Workers,* 729 F.2d 330, 336 (6th Cir. 1985).

That in a more recent decision, dated July 31, 1989, in the case of *United Transportation Union, Local 74 v. Consolidated Rail Corporation and United Transportation Union,* 881 F.2d 282 (1989). The Court held that the issues had been examined in cases in which the Defendant, Union's, duty of fair representation arose in actions concerning both 301 Labor Management Relations Act and the Railroad Labor Act and held that Courts have refused to distinguish between the two Acts for purposes of fair representation suits and stated that there is a conflict among the Circuits. Further the Sixth Circuit held that employees need not resort to internal union remedies if it would be futile to do so because the position of the Union is clearly "hardened against them". *Gettes v. Chrysler Corporation,* 608 F.2d 261 (6th Cir. 1979). Furthermore, this Court has held that it is well settled that futility is an excuse for failure to exhaust internal union remdeies, *Glover v. St. Louis-San Francisco Railroad Company,* 393 U.S. 324 (1969).

Further, the *Local 74,* decision, *supra,* does clearly hold opposite to the Seventh Circuit Court of Appeals' decision in this matter.

The Sixth Circuit held that:

> "It is clear that Local 74 did not exhaust all available internal union remedies, for it could have appealed to the Union Board of Appeal, the October, 1981 decision by the UTU President not to merge seniority rosters to establish yard equity, and his subsequent refusal to alter this decision."
>
> "Local 74 contends that it should be excused from the exhaustion requirements because UTU was clearly hostile toward the position of the employees. We hold that Local 74 presented sufficient evidence to preclude a directed verdict on this issue." Thus, there is a direct conflict between the different Federal Circuits on the same matter and respectfully request this Court to grant Certiorari to resolve said conflicting decisions.

In summary *Del Costello, supra*, this Court held that the duty of fair representation is grounded in labor organizations exclusive right to represent all unit employees in collective bargaining, thereby depriving individuals of ability to bargain individually or select a minority union as their representative. That as held in *Vaca v. Sipes*, 386 U.S. 171 (1967), it was stated that in order to permit individual employees to protect their own interest, the representative organization has a duty "to serve the interest of all members without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct". The test of whether the duty to represent has been upheld by the union seeking to accommodate two (2) conflicting groups is whether a rational method was used to resolve the conflict. *Humphrey v. Moore*, 375 U.S. 335 (1964).

The Seventh Circuit decision is plain error and is conflicting with other circuits decision on the same facts and issues.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: October 24, 1989

APPENDIX

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 88-2541

LARRY ZAPP, et al.,
Appellants,

v.

UNITED TRANSPORTATION UNION,
Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division
No. IP 77-425-C—Sarah Evans Barker, *Judge*

ARGUED MARCH 31, 1989—DECIDED JULY 7, 1989

Before CUMMINGS, POSNER, and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* This case comes before us for the second time. *See Zapp v. United Transportation Union*, 727 F.2d 617 (7th Cir. 1984). Plaintiffs, 145 former employees of the Indianapolis Union Railway Company (IU), appeal from the district court's entry of summary judgment in favor of defendant United Transportation Union (UTU). For the reasons discussed below, we affirm.

I.

On February 1, 1968, the Pennsylvania Railroad, of which the IU was a wholly-owned though independently operated subsidiary, merged with the New York Central Transportation Company thereby creating an entity known as the Penn Central Transportation Company. Prior to the effectuation of the merger, negotiations designed to protect the seniority rights of affected employees took place. Those negotiations ultimately produced an agreement that granted most employees a February 1, 1968 seniority date on Penn-Central track. Due to its independent status, IU employees were not a party to this agreement. Consequently, these employees, while retaining their original date of hire seniority on track within IU territory, did not receive any seniority date on other Penn-Central track, a fact that was alleged to have produced inequitable results. Shortly after the merger was effected, the IU employees retained the UTU as their exclusive bargaining representative.

During the mid-1970's Congress created Conrail, a corporation formed to acquire the assets of several bankrupt railroads including the Penn-Central. On December 18, 1975, a collective bargaining agreement was signed that defined the seniority rights of employees affected by the pending Conrail acquisitions. Essentially, the agreement preserved the seniority status quo for employees throughout the territory of the acquired railroad while granting them a seniority date on other Conrail track commensurate with the date of acquisition of their former employer. For IU employees, the agreement meant that they retained their date of hire seniority on former IU track while obtaining an April 1, 1976 seniority date on all other Conrail track including track within the territory of the defunct Penn-Central Transportation Company. Plaintiffs' representatives received copies of the collective bargaining agreement sometime before September 1, 1976.

On January 24, 1977, seniority rosters detailing the status of former IU employees were posted. Shortly thereafter, plaintiffs' representatives complained to the UTU about the inequitable result produced by the December 18, 1975 collective bargaining agreement. The UTU's response, however, failed to mollify the former IU employees. As a result, on July 12, 1977, plaintiffs filed this suit in the district court alleging that the UTU breached its duty of fair representation by entering into an unsatisfactory collective bargaining agreement. Specifically, the plaintiffs decried the fact that the UTU had failed to obtain a February 1, 1968 seniority date on former Penn-Central track for them. The complaint was amended four times over an eleven year period before the district court entered summary judgment in favor of the defendants. The district court, in a comprehensive and well-reasoned opinion, held that plaintiffs' suit was not filed within the applicable limitations period, *i.e.* six months after the signing of the collective bargaining agreement, *see United Independent Flight Officers, Inc. v. United Air Lines*, 756 F.2d 1262, 1273 (7th Cir. 1984) and rejected various arguments supporting a tolling of the limitations period. Plaintiffs now appeal from the district court's decision.

II.

The problem presented by this case is determining when plaintiffs' claims accrued. In *Ranieri v. United Transportation Union*, 743 F.2d 598, 599 (7th Cir. 1984), this court held that a suit by an employee alleging a breach of the duty of fair representation is governed by the six month statute of limitations held applicable to "hybrid" fair representation/employer suits by the Supreme Court in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).[1] Subsequently, in *United Independ-*

[1] Although this action was commenced approximately six years before *Del-Costello* was decided, we have held that that decision applies retroactively. *See Landahl v. PPG Industries, Inc.*, 746 F.2d 1312 (7th Cir. 1984).

ent Flight Officers, Inc. v. United Air Lines, 756 F.2d 1272, 1273 (7th Cir. 1984), we enunciated the general principle applicable to this case that causes of action based on entry into collective bargaining agreements accrue when the agreement is signed. In *Clift v. UAW*, 818 F.2d 623, 629 (7th Cir. 1987) (per curiam), we recognized a narrow discovery exception to this principle holding that the six-month statute of limitations period does not begin to run until the aggrieved party discovers or with the exercise of reasonable diligence could have discovered the existence of the contract. We emphasized, however, that the plaintiff has the burden of proving that he or she falls within this exception. *Id.* Moreover, we stated that in cases involving multiple plaintiffs which have not been certified as class actions (such as the present case), each individual plaintiff must adduce evidence demonstrating that he or she fit within the discovery exception. *Id.* at 630.

In the present case, each individual plaintiff was required to adduce evidence demonstrating that he or she had not discovered the existence of the collective bargaining agreement prior to January 12, 1977 and could not have done so through the exercise of reasonable diligence in order to come within the discovery exception to the time-bar rules. In our view, none of the plaintiffs has satisfied this exacting standard. The record contains three items of evidence relevant to the discovery exception. The first item is a stipulation of fact entered into by most of the plaintiffs. This stipulation stated that the plaintiffs had no idea when they first became aware of the collective bargaining agreement. Obviously, a statement of this nature does not provide this court with evidence that these plaintiffs did not know of the existence of the collective bargaining agreement prior to January 12, 1977.

The second item of evidence in the record is an affidavit submitted by Russell Overstreet, one of plaintiffs' repre-

sentatives. In his affidavit, Overstreet stated that he received a copy of the collective bargaining agreement in the middle or latter part of 1976. (The district court found no later than September 1, 1976). Obviously, this is more than six months prior to July 12, 1977.

The final item of evidence is an affidavit submitted by one Charles Baker. In his affidavit Mr. Baker stated that he did not learn of the existence of the collective bargaining agreement until the early part of 1977. Again, however, this submission is not sufficient to avoid summary judgment on the discovery exception issue. "The early part of 1977" could be a date in January prior to January 12—the precise date is crucial—and as we emphasized above plaintiff bore the burden of proving that he came within the discovery exception. Moreover, even if we were to interpret this statement as alleging that Mr. Baker did not actually know of the existence of the agreement until the posting of the seniority rosters until January 24, 1977, we would still conclude that Baker as well as all other plaintiffs have failed to show that they could not have reasonably discovered its existence much earlier. Baker's affidavit states that in the fall of 1976 rumors that the UTU was not adequately representing the interests of IU employees were rampant on the IU track. In view of these rumors, we fail to see why a diligent employee who was concerned about his seniority status under Conrail would not have asked his representatives, who were in possession of the collective bargaining agreement at the time, about the matter.

In sum, we find that no plaintiff has adduced specific facts demonstrating that he or she had not discovered the existence of the collective bargaining agreement prior to January 12, 1977 and could not have done so through the exercise of reasonable diligence. Consequently, we affirm

the district court's entry of summary judgment in favor of the UTU.[2]

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[2] Plaintiffs also raise several other arguments on appeal, none of which have merit. First, plaintiffs contend that the statute of limitations was tolled due to the UTU's fraudulent concealment of the existence of the collective bargaining agreement. *See Bonds v. Coca-Cola*, 806 F.2d 1324 (7th Cir. 1986). This argument, however, strains credulity in view of the fact that the UTU had sent copies of the collective bargaining agreement to plaintiffs' representatives by September 1, 1976.

Second, plaintiffs claim that the limitations period was tolled while the plaintiffs exhausted their intra-union remedies. *See Frandsen v. Brotherhood of Railway, Airline and Steamship Clerks*, 782 F.2d 674 (7th Cir. 1982). As the district court correctly pointed out, however, the plaintiffs clearly did not exhaust their intra-union remedies in this case.

Finally, plaintiffs argue that defendants should be estopped from asserting the statute of limitations as a defense. In *Bomba v. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978), we held that a party who has induced another into forebearing suit within the applicable limitations period will be estopped from arguing the statute of limitations. We emphasized, however, that on a motion for summary judgment, the burden is on the plaintiff to present facts . . . which if true would require a court as a matter of law to estop the defendant from asserting the statute of limitations. *Id.* at 1070-71 (quoting *Burke v. Gateway*, 441 F.2d 946, 948-49 (3d Cir. 1971). The record in this case is devoid of any such facts.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 77-425-C

LARRY ZAPP, *et al.*,
Plaintiffs,

vs.

UNITED TRANSPORTATION UNION,
Defendant.

ENTRY

[Filed July 20, 1988]

This matter is before the court on the motion for summary judgment filed by defendant United Transportation Union ("UTU") on September 28, 1987. The plaintiffs, one hundred forty-five individuals formerly employed by the Indianapolis Union Railway Company ("IU"), responded to the motion on December 8, 1977. The defendant replied on December 17, 1987. The parties have supplemented their submissions with affidavits, documents, deposition testimony, answers to interrogatories, and stipulations of fact in accordance with Fed. R. Civ. P. 56(e).[1] The court's ruling on the motion is set out in the memorandum below.

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[1] These supplementary materials include the affidavits and attached exhibits of Charles O. Baker, Clyde Rather, and Russell H. Overstreet, excerpts from the deposition testimony of William R. Imel and J. H. Palmer, the seniority agreements at issue, and four sets of stipulated facts (including exhibits).

Memorandum

Background

The long and complicated history of this case has been fully chronicled on previous occasions [2] and need not be repeated in great detail here. However, certain facts, undisputed by the parties, warrant recitation as the basis for the court's analysis of the issues presented by UTU's summary jdgment motion.

The plaintiffs are former employees of the IU, an interchange railroad circling Indianapolis. Originally, the IU was a wholly-owned subsidiary of the Pennsylvania Railroad but operated as a separate unit. On February 1, 1968, the New York Central Railroad was merged into the Pennsylvania Railroad to become the Penn Central Transportation Company ("Penn Central").

At that time, the IU became a subsidiary of the Penn Central by virtue of the change in name of its parent. As a result of the merger, employees of the former Pennsylvania and New York Central railroads were given a February 1, 1968 seniority date on Penn Central track. The IU and its employees, however, were not represented by a union signatory to the employee protection agreement executed in conjunction with that merger, probably because the continued independent operation of the IU lines was contemplated. IU employees therefore were not expressly afforded any seniority date on Penn Central track and merely kept their original date of hire seniority on IU track.

Shortly following the Penn Central merger, the UTU became the labor relations representative of the plain-

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[2] The facts and procedural history of the case prior to Judge Dillin's entry of judgment on December 18, 1981, are set out in *Zapp v. United Transportation Union*, 727 F.2d 617 (7th Cir. 1984). Subsequent developments are outlined in this court's entry of February 9, 1987.

tiffs. Also following the merger, the operations of the Penn Central in relation to its subsidiaries changed in a manner that had an adverse impact on the IU employees. Specifically, Penn Central personnel (employees of the former Pennsylvania and New York Central railroads) began to take a greater role in the day-to-day operations of the IU and therefore took over some of the positions that had formerly been filled by IU employees.

After these adverse consequences to the IU employees became apparent, the UTU in 1971 petitioned the Interstate Commerce Commission ("ICC"), seeking a ruling that the merger protective conditions set out in the ICC's earlier order regarding the Penn Central merger (ICC Order of April 6, 1966) should extend to subsidiaries of the Penn Central like the IU.[3] The ICC issued its ruling on the UTU petition, the "Sixth Supplemental Report," in October of 1974, and plaintiffs Clyde Rather and Russell Overstreet, then union general chairmen for the IU employees, received copies of the report about three weeks later.

During the pendency of the union petition, Congress created the Consolidated Rail Corporation ("Conrail") to acquire the assets of a number of bankrupt railroads, including the Penn Central. In conjunction with the merger of the bankrupt railroads into Conrail, negotiations aimed at protecting the prior seniority rights of the employees of the railroads were conducted. According to Mr. Imel, an official of UTU, a meeting of union general chairmen was held in Cleveland to elect a committee of five persons to negotiate seniority agreements on behalf of the employees. Mr. Imel has testified that Mr. Rather, then a union general chairman and now a plaintiff, was present at the meeting. Both Rather and Overstreet maintain that they were not invited to this

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[3] Actually, the unions involved with that petition sought extension of the merger protective conditions to the employees of a number of railroads subsidiary to the Penn Central.

meeting (and presumably did not attend) despite prior expressions of interest in the matter and inquiries to UTU officials on behalf of the IU employees they represented.

On December 18, 1975, Conrail officials and the five-member UTU committee executed seniority agreements to govern the seniority rights of the employees of the merged railroads. One agreement applied to trainmen and conductors, the other to engine service employees. Essentially, the agreements provided that all employees with standing on prior seniority district rosters would retain their prior seniority date throughout the territory of their prior seniority districts. They would also gain new rights in other Conrail territories as of the date of their railroad's conveyance to Conrail.[4] Applied to IU employees, these agreements provided for a seniority date in the former IU territory based on their date of hire and April 1, 1976 (the date of conveyance to Conrail) seniority on all other track. Plaintiffs Rather and Overstreet received copies of these seniority agreements sometime in 1976, apparently no later than September 1, 1976, according to correspondence between Rather and UTU official R.E. Swert. Fourth Stipulation of Fact, Exhibits A and B.

The parties agree, however, that at the time the seniority agreements were executed in December of 1975, it was still unclear whether IU would be subsumed in the Conrail merger. That uncertainty was resolved, at the latest, on April 1, 1976, the date of IU's conveyance to Conrail.

Immediately following conveyance to Conrail, the operations of the IU and its employees apparently did not change appreciably. In January of 1977, however, IU facilities and jobs were consolidated with those of other

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[4] A full explanation of this seniority scheme is set out in *Zapp*, 727 F.2d at 620-22.

track under the jurisdiction of Conrail. The plaintiffs maintain that

> [w]ith the posting of new selection order lists and seniority rosters, it became apparent to the IU employees that they would receive only a 1976 Conrail seniority date on all track other than former IU track and that the inequitable seniority treatment they had endured for many years would not be changed.

Plaintiffs' Response, p. 9 (citing Affidavits of Baker, Overstreet, and Rather).

Subsequent to these postings, the lawyer who had been retained by the plaintiffs, Mr. Richards, sent letters to Mr. Overstreet and Mr. Rather complaining of the seniority arrangement. On March 22, 1977, Mr. Richards also directed a letter of similar content to A.H. Chesser, International President of UTU. On March 25, 1977, President Chesser responded, in pertinent part:

> I do not agree with your suggestion that the United Transportation Union may not have filled its duty or fair representation in regard to the seniority rights of former Indianapolis Union Railway employees. I also do not concur in your position that requesting an "administrative meeting" with the undersigned or other union official constitutes exhaustion of administrative remedies. It is my understanding that *timely* appeals must be made in accordance with the procedures set forth in the union's Constitution before any claim of exhaustion of administrative remedies may be sustained.
>
> In regard to your threat to resort to the courts in this matter I can only tell you that it is our practice to defend ourselves to the fullest extent permitted by law and I can assure you that we will do so in this case.

Third Set of Stipulations, Exhibit K.

On July 12, 1977, the plaintiffs filed this lawsuit, alleging, among other things, that UTU breached its duty of fair representation. Count I of the complaint alleges that UTU breached its duty of fair representation by entering into collective bargaining agreements on December 18, 1975, which would not afford the plaintiffs seniority equivalent to that of former Pennsylvania, New York, or Penn Central employees. Count II alleges hostile discrimination by UTU in agreeing to such a consolidation plan and in "continuously, arbitrarily and capriciously" refusing to attempt an alteration of the seniority system.

Analysis

With its summary judgment motion, UTU maintains that it is entitled to judgment as a matter of law because the plaintiffs' claims are barred by the applicable six-month statute of limitations.

In *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Supreme Court resolved the question of which statute of limitations should apply to a suit by an employee against an employer under section 301 of the Labor Management Relations Act joined with an action against a union for breach of its duty of fair representation (the "hybrid section 301 claim"). The Court held that the six-month limitation period of section 10(b) of the National Labor Relations Act applies to both aspects of the hybrid action. *Id.* at 169-73. This six-month limitation period also applies to fair representation suits brought, like this one, under the Railway Labor Act. *United Independent Flight Officers, Inc. v. United Air Lines*, 756 F.2d 1262 (7th Cir. 1984). Furthermore, the fact that this action now proceeds only against the union does not present a reason for departure from the *Del Costello* rule. *See Flight Officers*, 756 F.2d at 1270.

Additionally, the limitation period mandated by *Del Costello* is retroactive, so it applies to this action even though the events underlying this litigation occurred well before *Del Costello* was decided. *Bonds v. Coca-Cola Company*, 806 F.2d 1324, 1326 (7th Cir. 1986) (citing *Landahl v. PPG Industries, Inc.*, 746 F.2d 1312 (7th Cir. 1984)).[5]

Finally, the *Del Costello* six-month limitation period applies to claims arising out of the negotiating process as well as to claims based on the handling of employee grievances. *See Flight Officers*, 756 F.2d at 1270-71.

The foregoing rules regarding the applicability of a six-month statute of limitations to this action have not been the subject of disagreement between the parties. Rather, the parties disagree about when the limitations period began to run and whether it was tolled by virtue of circumstances preceding the filing of this lawsuit.

Generally speaking, causes of action based on entry into collective bargaining agreements accrue, and the limitations period begins to run, when the contract is signed. *Flight Officers*, 756 F.2d at 1273 (citing *Local Lodge No. 1424, International Association of Machinists v. NLRB*, 362 U.S. 411 (1960)). In *Clift v. UAW*, 818 F.2d 623 (1987), the Seventh Circuit refined that rule somewhat by stating that the plaintiffs' claims accrue when the collective bargaining agreement is entered into, unless the existence of the new contract could not reasonably have been discovered until later and was not actually discovered by the plaintiffs until later. *Id.* at 629. The court pointed out, however, that the discovery rule is an exception to time-bar rules and each individual plaintiff bears

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[5] In *Landahl*, the Seventh Circuit found that retroactive application was warranted because *Del Costello* represented a clarification of the law, not a "clean break" with past precedent. 746 F.2d at 1315.

the burden of proving that he or she personally met the discovery exception. *Id.* at 629-30.

The seniority agreements, the negotiation of which the plaintiffs claim constituted a breach of UTU's duty of fair representation, were signed on December 18, 1975. The plaintiffs' complaint was filed July 12, 1977, well beyond the six-month period. The plaintiffs claim, however, that they "did not know and had no reason to know of the Seniority Agreements' provisions until long after December 18, 1975." Furthermore, the plaintiffs maintain that principles of equitable tolling or equitable estoppel delayed the running of the limitations period. Finally, they contend that the limitations period was tolled while they "exhausted their intra-union remedies."

Although the plaintiffs' arguments overlap somewhat in terms of facts and legal authority, the court will, for the sake of clarity, address each argument separately.

A. *Discovery of Seniority Agreements*

As articulated above, a claim for breach of the duty of fair representation based on a union's entry into a collective bargaining agreement accrues when the agreement is entered into "unless the existence of the new contract could not reasonably have been discovered until later and was not actually discovered by plaintiffs until later." *Clift*, 818 F.2d at 629.[6] Significantly, each individual

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[6] The plaintiffs have articulated the rule to be that the action does not accrue until the claimant discovered or should have discovered the acts constituting the alleged violations, citing *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984). That formulation of the rule is correct, of course, but is too imprecise in this context. The alleged violation in *Metz* was based on the union's failure to pursue a grievance on behalf of the plaintiff; the court therefore focused on the time at which the plaintiff should have discovered that particular failure. However, in *Flight Officers* and *Clift*, as in this case, the asserted violation was predicated on the union's entry

plaintiff bears the burden of proving that he or she fell within this "discovery" exception. *Id.* at 629-30.

Initially, the court must note that the submissions of the plaintiffs fall short of the standard necessary to enable the court to make the sort of individualized inquiry contemplated by the Seventh Circuit in *Clift*. All of the plaintiffs except Overstreet and Rather state, in answer to the question when they first became aware of the seniority agreements, that

> I have no idea when I first became aware, if I became aware at all, of the provisions of what this Interrogatory refers to as "the Agreement between Conrail and certain of its Employees represented by the United Transportation Union, concerning the seniority of Conductors and Trainmen." My counsel, Dean Richards, has referred to several agreements and contracts during the course of this litigation, but I do not honestly know if those references dealt with this Agreement or other agreements.

Third Set of Stipulations of Fact, ¶ 9. These conclusory statements do not reveal when the plaintiffs became aware of the existence of the seniority agreements or of their efforts made that would have led to the discovery of the seniority agreements. These general assertions therefore do not aid the court with regard to the relevant inquiry.

Instead, the court must look to other undisputed evidence proffered by the parties. That evidence compels the conclusion that the plaintiffs had discovered, or, with the exercise of reasonable diligence, should have discovered, the existence of the seniority agreements more than six months prior to filing this lawsuit.

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into a collective bargaining agreement that allegedly evidenced discrimination against the plaintiffs. In this context, the Seventh Circuit has pinpointed "the acts constituting the alleged violation" as the time at which the collective bargaining agreement was signed.

The seniority agreements were signed December 18, 1975. Mr. Overstreet and Mr. Rather, local representatives of the plaintiffs (and now plaintiffs themselves) received copies of those agreements in 1976. Those agreements essentially preserved for the IU employees what they had before—date of hire seniority on IU track. The agreements also created a seniority date on all other Conrail track as of the date of the railroad's conveyance to Conrail. The inequitable situation the plaintiffs were in was born out of their previous lack of an express prior seniority date on Penn Central track. Presumably, the plaintiffs' claim is predicated on the argument that UTU should have done something affirmatively in the Conrail negotiations to improve this situation.[7] The provisions of the agreements make clear that no such affirmative improvement was negotiated. For this reason, Mr. Overstreet was justifiably concerned when he received the seniority agreements in the middle or latter part of 1976 because

> the Seniority Agreements made a distinction between former Pennsylvania, New York and IU track in the proposed Conrail Seniority District "B". While this distinction was not in and of itself alarming, the provisions of the agreements, when coupled with the uncertainty of whether IU Employees would be treated differently than other former Penn Central employees, could be, and eventually were, interpreted to favor other Penn Central employees at the expense of IU Employees.

Affidavit of Rusell H. Overstreet, ¶ 10.

Mr. Overstreet and Mr. Rather, general chairmen of the plaintiff IU employees, undisputably became aware

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[7] Prior to the ICC's order of May 6, 1986, the gist of the plaintiffs' claim against UTU was that it was "derelict in failing to recognize plaintiffs' entitlement to Pennsylvania employee status at the time of the 1975 collective bargaining agreements." *Zapp*, 727 F.2d at 625.

of the collective bargaining agreements sometime prior to September 1, 1976. Two uncertainties may have arguably delayed the beginning of the limitations period beyond this point. The first uncertainty is easily disregarded. As stated before, the parties to this action were not certain, at the time the seniority agreements were signed, that IU would become part of Conrail. It might therefore be inequitable to impute knowledge of the agreements to them if the agreements may not have applied to them. This uncertainty was resolved, however, by April 1 of 1976 at the latest, when IU was conveyed to Conrail, a date well before Mr. Overstreet and Mr. Rather apparently received their copies of the agreements.

The other uncertainty, to which Mr. Overstreet alluded in his affidavit, was whether IU employees would be treated differently from other Penn Central employees. Obviously, the agreements' provisions, coupled with a seniority distinction between IU employees and other Penn Central employees, would place the IU employees at the disadvantage of which they now complain. Two years before Mr. Overstreet and Mr. Rather received their copies of the agreements, the distinction between the IU employees (as well as the employees of other subsidiary lines) and other Penn Central employees had been the subject of the ICC's Sixth Supplemental Report. Unfortunately, the Sixth Supplemental Report did not lay the uncertainty regarding the differing treatment to rest. Specifically, if did not unambiguously order that the plaintiffs were entitled to February 1, 1968 seniority on Penn Central track, an interpretation urged by the plaintiffs. *See Zapp*, 727 F.2d at 625. *See also supra* note 7. This ambiguity caused the Seventh Circuit to determine that the ICC should resolve the matter under the doctrine of primary jurisdiction. *Id.* The plaintiffs seem to be arguing, then, that they could not have discovered the acts constituting UTU's breach of its fair representation duty because they could not have ascertained at that

time how the seniority agreements would operate in light of the Merger Report of 1966 and the Sixth Supplemental Report of 1974. This argument is unavailing for at least two reasons.

First, it ignores what was the current state of affairs at the time Mr. Overstreet and Mr. Rather received the seniority agreements. As the plaintiffs have emphasized a number of times, the alleged inequitable treatment of the plaintiffs had been ongoing for a number of years following the merger of the Pennsylvania and New York Central railroads. In other words, it was obvious in late 1976 that the plaintiffs were not being accorded February 1, 1968 seniority on Penn Central track. The seniority agreements, which clearly did nothing affirmatively to change this situation, reasonably should have alerted the plaintiffs to UTU's alleged breach of its duty in the negotiation of those agreements.

This argument is also unavailing because it improperly focuses on the point at which the plaintiffs discovered or could have discovered the deleterious *effect* the agreements would have on their seniority rights. The proper focus is simply on when the plaintiffs discovered or should have discovered the *existence* of the agreements. *See Clift*, 818 F.2d at 630. For this reason, the plaintiffs' sole reliance upon the time when the new seniority rosters were actually posted is also misplaced for purposes of determining when they discovered the existence of the agreements. The postings of the seniority rosters merely reflected the implementation of the seniority agreements. "The claim does not wait to accrue until the time at which the contested provisions of the agreement are enforced." *Id.* at 629.

The undisputed facts make clear, then, that plaintiffs Rather and Overstreet had discovered the existence of the seniority agreements sometime in 1976. (The court also believes that they should even have discovered the adverse impact of the agreements by that time.) The ques-

tion remains, though, whether each of the other individual plaintiffs discovered, or reasonably should have discovered, the existence of the agreements. As the court pointed out earlier, the plaintiffs' submissions in this regard do not satisfy the burden imposed on plaintiffs who wish to avail themselves of a "discovery" accrual date. *Clift*, 818 F.2d at 629-30. None of the plaintiffs unequivocally denies that he knew of the seniority agreements more than six months prior to the filing of suit. This leaves the court unable to conclude that the plaintiffs had not discovered the existence of the agreements. Furthermore, the other plaintiffs do not indicate what efforts on their behalf they undertook to discover the existence of the agreements. Instead, all of the other plaintiffs simply maintain that they "have no idea when" they first became aware of the *provisions* of the agreements. Third Set of Stipulations of Fact, ¶ 9 (emphasis added).[8]

The parties have not clearly addressed the effect of Rather and Overstreet's receipt of the seniority agreements vis a vis the knowledge of the other plaintiffs. In other words, it is not clear whether Rather and Overstreet's *actual* knowledge of the agreements should be imputed to the other plaintiffs. The court need not resolve this issue, however, because the undisputed facts demonstrate that all of the plaintiffs, through the exercise of reasonable diligence, should have discovered the existence of the seniority agreements. Their on-site representatives, Mr. Rather and Mr. Overstreet, were in possession of these agreements in 1976, a time during which the IU workers, in light of the Conrail merger, undoubtedly were concerned about their seniority status. Reasonable inquiries directed to Rather and Overstreet should have led

[8] In his affidavit, Charles Baker does state more specifically that he did not become aware of the seniority agreements until early 1977. ¶ 6. For the reasons cited *infra*, however, the court finds that Mr. Baker should have discovered the existence of the agreements more than six months before suit was filed.

to discovery of the seniority agreements. This conclusion, in addition to the plaintiffs' failure to satisfy the burden incumbent on parties asserting a discovery accrual date, compels the court to find that the plaintiffs' cause of action accrued more than six months prior to their filing suit.

B. *Equitable Tolling or Estoppel*

The plaintiffs further argue that, even if the limitations period began to run more than six months prior to the filing of this action, equitable principles preclude the application of the limitations bar. First, they contend, equitable tolling of the limitations period is appropriate because the plaintiffs' ignorance of their cause of action was a result of the defendant's fraudulent concealment. *See Bonds v. Coca-Cola Co.*, 806 F.2d 1324 (7th Cir. 1986). Alternatively, the plaintiffs maintain that UTU should be estopped from asserting the limitations defense because it lulled the plaintiffs into a false sense of security and into a position they would not otherwise have taken. *See Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978). *See also Bonds*, 806 F.2d at 1330 (Swygert, J., concurring in part and dissenting in part), for an explication of the two principles.

In support of these arguments, the plaintiffs point to inquiries made by Mr. Rather, Mr. Overstreet, and the plaintiffs' attorney to UTU officials regarding the plaintiffs' seniority rights. These inquiries, the plaintiffs contend, went for the most part unanswered until President Chesser's letter of March 25, 1977. With regard to the plaintiffs' allegation of fraudulent concealment of the cause of action, their line of reasoning has two basic flaws. First, none of the facts cited by the plaintiffs supports the contention that UTU fraudulently concealed the existence or the provisions of the seniority agreements. Indeed, UTU sent copies of the agreements to Rather and Overstreet, then union general chairman, in

1976. According to the unrefuted testimony of Mr. Imel, a UTU official, the normal practice of UTU was to send such agreements to each general chairman, who would then make copies for distribution to the members under his individual jurisdiction. Imel Dep., vol. II, p. 29. Second, the plaintiffs' argument muddles two distinct inquiries: the existence (and provisions) of the seniority agreements and the plaintiffs' rights as granted by the Sixth Supplemental Report. As indicated previously, the seniority agreements preserved whatever prior seniority rights the plaintiffs had and granted April 1, 1976 seniority on all other Conrail track. No ambiguity resided in the provisions of those agreements. On the other hand, both the UTU and the plaintiffs had looked to the Sixth Supplemental Report to define the protective conditions to which the plaintiffs were entitled. The impact of that report was the focus of the plaintiffs' inquiries.[9] Even if the defendant's alleged fraudulent concealment of the impact of the seniority agreements in light of the Sixth Supplemental Report were a relevant consideration, this court could not charge the UTU with fraudulent concealment in *1976* for failing to explain an impact that was not even clarified until the ICC's order of May 6, *1986*. *See Zapp*, 727 F.2d at 627 n.14. Furthermore, UTU official R.E. Swert unequivocally informed Mr. Rather by letter on September 1, 1976, that the new seniority agreements did not provide the plaintiffs with anything more than their prior rights on IU track and April 1, 1976 seniority on all other track. Mr. Swert also stated the

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[9] The muddling of these two concepts was noted in the Seventh Circuit's opinion. 727 F.2d at 624. As that court concluded, the Sixth Supplemental Report provided that the plaintiffs were entitled to the merger protective conditions, which included preservation of jobs, wages, and fringe benefits, it they were determined through arbitration to be "affected" by the merger of the Pennsylvania and New York Central railroads. The court further noted that such protective conditions have little to do with seniority directly, a matter determined by a collective bargaining agreement. *Id.*

UTU's position that the Sixth Supplemental Report "does not deal with the question of seniority." Fourth Stipulation of Fact, Exhibit B.

Unlike a fraudulent concealment of the defendant giving rise to an equitable tolling of the limitations period, equitable estoppel applies when the plaintiff knew of the existence of the cause of action, but the defendant's conduct caused him to delay bringing a lawsuit. " 'Estoppel arises where one, by his conduct, lulls another into a false security and into a position he would not take [otherwise].' " *Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1330 (Swygert, J., concurring in part and dissenting in part) (quoting *McWaters & Bartlett v. United States*, 272 F.2d 291, 296 (10th Cir. 1959)). The plaintiffs apparently rely on the same set of facts cited in support of their fraudulent concealment contention as a basis for their argument that UTU "lulled" them into forebearing suit. It is difficult to see, however, how UTU's conduct lulled the plaintiffs into a false security regarding their seniority status. In general, the plaintiffs maintain that their inquiries made to UTU officials regarding their seniority rights went unanswered until President Chesser's letter of March 25, 1977. This silence does not demonstrate the type of affirmative conduct that would cause a reasonable person to be lulled into a false security; if anything, it should have triggered a greater concern on the part of the plaintiffs.

Furthermore, the court rejects the plaintiffs' suggestion that the UTU's earlier efforts in petitioning the ICC on behalf of the IU employees lulled the plaintiffs into believing the union was on their side. *See* Plaintiffs' Response, pp. 17, 20. A union cannot be forced to fulfill its duty of fair representation at its peril. In other words, the court cannot accept the assertion that a prior act of the defendant for the plaintiffs' advantage should be interpreted later as conduct designed to lull the plaintiffs into abandoning their cause of action. The plaintiffs'

position on this matter, if the court is correctly apprehending it, is without legal or factual support.

In sum, the court finds no factual or legal basis for the contention that the UTU fraudulently concealed the plaintiffs' cause of action or falsely caused the plaintiffs to forebear in filing suit.

C. *Exhaustion of Intra-Union Remedies*

The Seventh Circuit has held that the six-month statute of limitations is tolled by the pursuit of internal union remedies, even when those remedies are ultimately determined to have been futile. *Frandsen v. Brotherhood of Railway, Airline and Steamship Clerks*, 782 F.2d 674 (1986). The plaintiffs maintain that "to the extent they knew that a problem existed with respect to UTU's representation,[10] plaintiffs exhausted every available union remedy in an effort to resolve this dispute." As the plaintiffs noted in their response, the *Frandsen* court adopted a holding reflecting "an effort to encourage every attempt of exhaustion." Plaintiffs' Response, p. 23.

In *Frandsen*, the Seventh Circuit was called upon to reconcile *Del Costello's* six-month limitations period with the Supreme Court's holding in *Clayton v. UAW*, 451 U.S. 679 (1981), generally requiring the exhaustion of internal union remedies prior to filing suit unless such exhaustion would be futile. *Frandsen* clearly reconciled those "two Supreme Court doctrines in favor of exhaustion of intra-union remedies." 782 F.2d at 674. In so doing, the Seventh Circuit held that the six-month limitations period is tolled until intra-union procedures are

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[10] This assertion, of course, somewhat undermines the plaintiffs' argument that they did not know of their cause of action against the union prior to January of 1977. Some of the plaintiffs' efforts cited in support of their exhaustion argument (letters from Rather and Overstreet to UTU officials) were undertaken long before January of 1977.

exhausted, even if those procedures were futile for the employee. *Id.* at 681.

The problem with the plaintiffs' invocation of the *Frandsen* tolling principle is that the plaintiffs admittedly did not exhaust their intra-union remedies. As President Chesser's letter of March 25, 1977, clearly pointed out, the union's constitution required a timely appeal from his determination. That procedure, set out in Articles 90 and 28 of the UTU Constitution, provides for (and requires) the filing of an appeal within ninety days with the General Secretary and Treasurer of the Union, that appeal to be heard by the Union's Board of Directors. First Set of Stipulations, Exhibit C.

The plaintiffs seek to be excused from the exhaustion requirement on the ground that exhaustion would have been futile. The plaintiffs fail, however, to offer concrete evidence of futility; rather, they expect the court to accept their conclusory allegation that appeal would have been futile and that the plaintiffs themselves were "exhausted." [11]

Allowing the plaintiffs to avail themselves of the tolling principle enunciated in *Frandsen* when they made no attempt to exhaust their union remedy would result in a subversion of the principle announced in that decision. The plaintiffs' assertion that holding their action time-barred would impose a " 'Catch 22' double standard upon employees caught between the exhaustion requirement and a short six month statute of limitations" entirely misses the point. Exhaustion of their intra-union rem-

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[11] The only evidentiary support offered by the plaintiffs for their futility contention is that they had been making fruitless inquiries of the union "for years." That assertion ignores the undisputed efforts UTU had made on behalf of the plaintiffs in petitioning the ICC. Furthermore, the basis for the plaintiffs' fair representation claim—the negotiation of the seniority agreements—was not the subject of their communications with UTU until the latter part of 1976.

edies was the very avenue by which the plaintiffs could have avoided the real "Catch 22" recognized by the *Frandsen* court. 787 F.2d at 681.

The plaintiffs also cite footnote 8 of the *Frandsen* opinion in support of their futility argument. In that footnote, the Seventh Circuit addressed the union's argument that tolling the limitation period in that case would have postponed the litigation for up to four years because the final appeal procedure occurred before a body that met only every four years. The court faulted this argument by pointing out that the union itself was responsible for the excessive length of the appeal procedure. The court additionally noted that "it would be blatently [sic] unreasonable to find that a union member did not exhaust all intra-union procedures when he did not appeal to a ruling board that meets only once every four years." 782 F.2d at 682 n.8. Apparently, then, the court would have been willing, in certain egregious circumstances, to excuse a failure to exhaust all remedies. The plaintiffs have not urged, however, and this court does not find, that the union's appellate procedures in this case make exhaustion "blatantly unreasonable."

For all of these reasons, then, the limitations period was not tolled while the plaintiffs "exhausted" their intra-union remedies.

Conclusion

For all of the foregoing reasons, the plaintiffs' action against UTU is barred by the statute of limitations. The plaintiffs have not met the burden necessary to avail themselves of a "discovery" statute of limitations; furthermore, the undisputed facts indicate that the plaintiffs discovered or should have discovered the existence of the seniority agreements more than six months prior to filing suit. Finally, the plaintiffs have demonstrated no basis for the tolling of the limitations period.

In light of the court's ruling on the statute of limitations defense, the other defenses raised in UTU's motion need not and will not be addressed.

The defendant's motion for summary judgment is GRANTED pursuant to Fed. R. Civ. P. 56(c). Judgment is therefore entered accordingly in favor of the defendant. The parties will bear their own costs.

It is so ORDERED this 20th day of July, 1988.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 77-425-C

LARRY ZAPP, *et al.*,
Plaintiffs,

vs.

UNITED TRANSPORTATION UNION,
Defendant.

FINAL JUDGMENT

The court, having considered the submissions of the parties in this action, including defendant's motion for summary judgment and the briefs in support and in opposition thereto, the supporting affidavit, documents, deposition testimony, answers and stipulations, and being fully advised in the premises, now enters its ruling on the defendant's motion for summary judgment as follows, to-wit:

(H.I.)

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED the the defendant's motion for summary judgment is GRANTED pursuant to Fed. R. Civ. P. 56(c). Final Judgment is hereby entered accordingly in favor of the defendant. The parties will bear their own costs.

It is so ORDERED this 20th day of July, 1988.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

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UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 81-3072

LARRY ZAPP, *et al.*,
Plaintiffs-Appellants,

v.

UNITED TRANSPORTATION UNION
and CONSOLIDATED RAIL CORPORATION,
Defendants-Appellees.

Argued Dec. 3, 1982

Decided Feb. 6, 1984

Dean E. Richards, Indianapolis, Ind., for plaintiffs-appellants.

John P. Price, Bingham, Summers, Welsh & Spilman, William A. Wick, White, Raub, Wick & Riegner, Indianapolis, Ind., for defendants-appellees.

Before CUMMINGS, Chief Judge, CUDAHY, Circuit Judge, and TIMBERS, Senior Circuit Judge.*

CUDAHY, Circuit Judge.

Plaintiffs appeal from the judgment of the district court dismissing their Third Amended Complaint against

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* The Honorable William H. Timbers, Senior Circuit Judge for the Second Circuit, is sitting by designation.

their Union, the United Transportation Union (the "UTU"), and their employer, the Consolidated Rail Corporation ("Conrail"). We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. *The Parties*

Plaintiffs are 126 individual engineers and trainmen (this is not a class action) formerly employed by the Indianapolis Union Railway Company (the "IU"), a "beltline" industry and interchange railroad circling Indianapolis. The IU was originally a wholly-owned subsidiary of the Pennsylvania Railroad. On February 1, 1968, the New York Central Railroad was merged into the Pennsylvania to form the Penn Central Transportation Company (the "Penn Central"), and the IU became a subsidiary of the Penn Central by virtue of the change in name of the parent. The parties agree that, despite the intercorporate ties, the IU at all times operated as a unit separate from the Pennsylvania and the Penn Central. Defendant Conrail, an entity created by the Regional Rail Reorganization Act of 1973 (the "3R Act"), 45 U.S.C. § 701 *et seq.*, was formed to acquire the assets of a number of bankrupt railroads. On April 1, 1976, the assets of the Penn Central and the IU were conveyed to Conrail, and employees of both railroads were offered employment with Conrail.[1] Defendant UTU was formed in 1969 by the merger of various craft unions, and thereafter represented ground service employees on the IU; from 1969 to 1976 the Brotherhood of Locomotive Firemen and Engineers represented IU firemen and engineers, and, since 1976, the UTU has represented the firemen, while the engineers have been represented by the Brotherhood of Locomotive Engineers. The UTU denies any responsibility for plaintiffs who are locomotive engineers.

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[1] Other railroads were also acquired by Conrail, but only the IU and the Penn Central are relevant to this litigation.

II. *The Claims*

Prior to the conveyance of the various rail properties to Conrail, the UTU and Conrail signed a collective bargaining agreement dated December 18, 1975, consolidating the seniority rosters of the various acquired railway lines. Plaintiffs allege that as a result of this agreement, they received a seniority date of April 1, 1976 (the date of the conveyance to Conrail), while employees of the former Penn Central received a February 1, 1968 seniority date (the date of the merger of the New York Central into the Pennsylvania). Plaintiffs further allege that as a result of the disparity in seniority dates, former IU employees are consistently bumped by formed Penn Central employees with later dates of hire and are more often furloughed or awarded less favorable job assignments. Plaintiffs therefore seek to have the seniority provisions of the collective bargaining agreement between Conrail and the UTU reformed to give them February 1, 1968 seniority throughout their Conrail seniority district.

Plaintiffs assert three discrete complaints against the Union:[2] (1) The Union violated a 1974 Interstate Commerce Commission ("ICC") order protecting the rights of employees of subsidiaries of railroads involved in the Penn Central merger. (2) Section 504(b) of the 3R Act, 45 U.S.C. § 774(b), requires that local unions be involved in negotiations relating to the seniority rights of employees affected by mergers, and this requirement was not met.[3] (3) The Union breached its duty of fair representation by failing to protect the seniority rights of

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[2] Plaintiffs' discursive complaint is not divided into counts, but, according to plaintiffs' brief on appeal, the district court was correct in concluding that these were plaintiffs' distinct claims.

[3] It is unclear whether the claim against the UTU is that it should have refrained from negotiating on plaintiffs' behalf or should have taken affirmative steps to include the IU locals in the negotiations. Plaintiffs do not claim that Conrail was at fault in negotiating with the wrong representatives.

plaintiffs, who were employees of a small railroad and a numerically small contingent within the UTU.

The district court dismissed the first claim on alternative grounds. First, if the claim is construed as a suit to enforce an order of the ICC, the claim is jurisdictionally defective on account of plaintiffs' failure to join the United States, a necessary party under the Urgent Deficiencies Act, 28 U.S.C. § 2321 *et seq.* Second, even if the enforcement claim were properly in federal court, the ICC order could not be enforced until plaintiffs' rights under the order are clarified, and that is a matter appropriately referred to the ICC under the doctrine of primary jurisdiction.

The claim under Section 504(b) of the 3R Act was dismissed for failure to state a claim since neither the statute nor the cases interpreting it provide support for plaintiffs' contention that local rather than system-wide bargaining over seniority rights is required. The duty of fair representation claim was dismissed on the ground that plaintiffs had made only conclusory allegations of discrimination.

Two claims were advanced against Conrail: (1) Conrail violated the 1974 ICC order in establishing the consolidated seniority rosters. (2) Conrail failed to follow the requirements of Sections 4 and 5 of the 3R Act. In addition there was a general allegation that Conrail had acted "in concert with" the Union in negotiating seniority. The first claim is essentially the same as the first claim raised against the Union, and Judge Dillin dismissed it on the same alternative jurisdictional grounds. The second claim was dismissed for vagueness; the 3R Act contains no Section 4 or 5.[4]

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[4] We approve the dismissal of this claim. It is conceivable that plaintiffs meant to refer to some other sections of the 3R Act or to Section 5 of the ICC Act; Section 5(2)(f) of the ICC Act contains the labor protection provisions at issue in the 1974 ICC order. However, even under the liberal requirements of notice pleading,

On appeal, plaintiffs argue that the duty of fair representation claim was improperly dismissed, that the 1974 ICC order may be enforced without clarification by the ICC, that the United States either is not a necessary party to an enforcement action or should have been joined by the district court under Rule 19, FED.R.CIV.P., and that for purposes of a motion to dismiss, plaintiffs' allegations about the meaning of the ICC order and the 3R Act must be taken as true. Plaintiffs also argue that the district court should have converted defendants' motion to dismiss to a motion for summary judgment and that the court improperly considered matters outside the pleadings in ruling on the motion to dismiss.[5]

III. *Background*

While there is at least a superficial appeal to plaintiffs' claim that there is an obvious injustice in the disparity between the February 1, 1968 and April 1, 1976 seniority dates, plaintiffs' claims must be evaluated in the context of twenty years of rail consolidations within the Northeastern United States. In each successive merger or acquisition culminating in the formation of Con-

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defendants should not have to guess about the statutory basis for this lawsuit. Plaintiffs have had three opportunities to amend their complaint, and this court ought not to speculate further about the real nature of this claim.

[5] The thrust of this contention is not entirely clear. Some of plaintiffs' claims were dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction, and some under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. A 12(b)(6) motion is to be treated as a motion for summary judgment "when matters outside the pleadings are presented to and not excluded by the court." Rule 12(b), FED.R.CIV.P. This provision by its terms is not applicable to a 12(b)(1) motion. The only extraneous evidentiary material in the record is a deposition extract included by plaintiffs in a memorandum in opposition to a motion to dismiss. It is clear from the district court's entry that neither this nor any other factual material was considered by the district court.

rail, redundant lines and facilities—and, unfortunately, jobs—have been eliminated. Such streamlining is frequently an element of consolidation into a more economically viable unit, and the ICC is charged with determining when such consolidation, appropriately hedged with labor protective conditions, is in the public interest. As an integral part of these organizational changes, previously independent seniority rosters have been consolidated.

Inevitably, at least some workers will be less well off than they were prior to facility or seniority consolidation, not because of legally cognizable wrongdoing, but because they had the ill fortune to be part of a declining industry. And, of course, a union cannot, in a situation of job contraction, easily satisfy all its members. Plaintiffs seem undoubtedly to be less well off than they were prior to the acquisition by Conrail. But the question for us in reviewing the dismissal of their complaint is whether they have alleged cognizable injury (and whether they have sued appropriate parties). Accordingly, some delving into the history of the ICC orders and the successive rail and seniority consolidations is necessary in order to determine whether plaintiffs have enforceable claims under the ICC orders or have adequately alleged that the UTU discriminated against them.

A. Seniority and Facility Consolidation

As we understand it, the present consolidated seniority system is the end result of a succession of mergers and acquisitions under which each employee retained seniority rights on his prior seniority district and acquired new seniority rights, as of the date of merger, throughout the new consolidated seniority district formed.[6] Such a pro-

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[6] A consolidated seniority district might be composed of several prior seniority districts belonging to each of the merging (or acquired) lines. An individual trainman would thus retain "prior

cedure for consolidating seniority rosters seems, on the face of it, one acceptable approach to the problem.[7]

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right" seniority in his original district and would acquire new rights in seniority districts formerly belonging to another railroad and in such other seniority districts of his own line as might be assigned to the new district. Since "prior right" seniority is specific to a particular section of track, prior rights are extinguished if the track is abandoned.

Seniority rights then held are typically guaranteed by the terms of the collective bargaining agreement accompanying each merger or acquisition. The legislation creating Conrail similarly provided that the procedure for determining Conrail system seniority "shall, to the extent possible, preserve [the employees'] prior seniority rights. . . ." 45 U.S.C. § 774(b)(4). Thus, an employee with a lengthy employment history might, after a succession of such consolidations, have seniority throughout the most recently formed district as of the date of its formation, "prior right" seniority throughout a previously consolidated sub-area as of the date of that consolidation, and "prior prior right" seniority as of his date of hire on his original seniority district. In theory, with gradual employee retirement, a seniority roster will eventually be determined only by the date of hire into the newest consolidated district.

[7] This territory-specific system for consolidating seniority rosters has been used in a number of railorad mergers. Another possibility for seniority consolidation involves "dovetailing," or the compiling of a single roster with workers listed in the order of their dates of hire; under this plan, no employee retains any superior right to work on track within his prior seniority district. Another possible system uses "work equity" seniority consolidation. This was the system used in the merger that resulted in the formation of the Burlington Northern; *see Augspurger v. Brotherhood of Locomotive Engineers*, 510 F.2d 853, 855-56 (8th Cir. 1975), for a detailed description of variations on this theme. Under this approach, the total number of slots on the consolidated roster allocated to each of the merging railroads (or to the various seniority districts of any one railroad) reflects the relative amount of work (typically measured by engine hours) brought into the new consolidated district from each prior district. No employee retains any claim on work in his prior district. Individual employees obtain work on the slots allocated to their prior district according to their standing on their prior district rosters. We do not understand plaintiffs to be complaining about the choice of a territory-specific method of seniority consolidation for the Penn Central and

An agreement dated December 21, 1966 between the Pennsylvania and the New York Central Railroads and their employees represented by the Order of Railway Conductors and Brakemen and the Brotherhood of Railway Trainmen provided for the establishment, in the event of merger, of new Penn Central seniority districts, to be arranged so that employees in the new districts would retain prior rights to employment in their pre-existing seniority districts. A November 16, 1967 Implementing Agreement between the same parties specifically provided for the creation of Penn Central Seniority District No. 2, Southwestern, which was to encompass the Indianapolis Terminal Yards of the Pennsylvania and New York Central Railroads (and three other Pennsylvania and fifteen other New York Central prior right districts). Geographically, District No. 2 is roughly described as a triangle with vertices at Indianapolis, Peoria and Cairo, Illinois. The effect of this agreement was to give former employees of the Pennsylvania and New York Central Railroads seniority throughout Penn Central Seniority District No. 2, effective as of the date of merger, February 1, 1968, while such employees would at the same time retain prior rights within their respective former seniority districts. Priority among the large group of employees with the same Penn Central seniority date who might be competing for jobs on track on which none of them had prior right seniority would be determined by their earliest retained seniority date as a trainman (generally the employee's date of hire). Plaintiffs were not directly involved in the Penn Central merger, hence, acquired no seniority in Penn Central Seniority District No. 2. Conrail, not yet in existence, was of course not a party to any of these agreements.

Conrail consolidations. Rather, plaintiffs apparently want only to be assigned the same seniority date as former Penn Central employees.

In advance of the conveyance of the Penn Central to Conrail, a Single Implementing Agreement was entered into on July 23, 1975 between Conrail and various craft unions representing employees of the railroads in reorganization. All employees of railroads acquired by Conrail would be offered employment with Conrail and would not lose seniority rights then held. A December 18, 1975 collective bargaining agreement between defendants Conrail and the UTU provided for the creation of eight Conrail seniority districts, including District B, Southwestern, which encompassed all of the former Penn Central Seniority District No. 2 (four Pennsylvania road and yard prior right districts and sixteen former New York Central road and yard prior right districts) as well as all of the territory of the former Indianapolis Union Railway Company. This Agreement provided that all employees with standing on prior seniority district rosters would retain their prior rights throughout the territory encompassed by their prior seniority districts; in addition these employees would gain new rights in territories which were previously separate and unrelated. This appears to be the same system used for Penn Central seniority consolidation. Thus, former Pennsylvania and New York Central employees who were in Penn Central Seniority District No. 2 would acquire an effective April 1, 1976 seniority date in the prior Indianapolis Union seniority district (where they previously had no rights), and would retain February 1, 1968 seniority in Penn Central District 2 territories ("prior" rights), as well as whatever seniority they had on their old Pennsylvania or New York Central districts ("prior prior" rights). Former Indianapolis Union employees, on the other hand, acquired April 1, 1976 seniority in all former Pennsylvania and New York seniority districts encompassed by former Penn Central Seniority District No. 2 (where they previously had no rights) and retained their IU territory seniority.

A June 23, 1976 Agreement between the UTU and Conrail provided for the consolidation of the Indianapolis yard facilities of the former Penn Central and IU railroads and for the allocation of jobs in accordance with a selection order list designed to insure that overall, former Pennsylvania, New York Central, and IU employees received a proportionate share (based on engine hours worked) of the available jobs. The proportions appear to be New York Central, 40%, and 30% each for the IU and Pennsylvania.[8] Prior seniority rosters for each line determine which individual IU employees are assigned the jobs allocated to the IU. The Penn Central February 1, 1968 and Conrail April 1, 1976 seniority dates would seem to play no role in establishing the selection order list.

In view of this history of seniority and facility consolidation, the allegation that Indianapolis Union employees have April 1, 1976 seniority and all other employees have February 1, 1968 seniority seems to us to cover only part of the story. If we are correct about the operation of the various successor seniority districts, the picture is complex. The resolution of any given seniority conflict involving "road" or "track" jobs apparently depends primarily on the origin of the track where the conflict arises. Thus (for example) on a line near Indianapolis once owned by the Pennsylvania Railroad, a former Indianapolis Union employee would have April 1, 1976 seniority, a former New York Central employee February 1, 1968 seniority, and a former Pennsylvania Railroad employee

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[8] This "work equity" system (*see* n. 7 *supra*) is the system typically used in consolidating yard facilities. In contrast to the prior right system used in the Penn Central and Conrail *track* job roster consolidations (in which prior rights are lost if the track is abandoned), employees have no "prior right" to jobs on their former *yard* facilities. However, even if a terminal yard formerly owned by one of the merging carriers is completely abandoned, employees from that prior seniority district are entitled to a proportionate share of the remaining jobs.

might have seniority back to his date of hire well before February 1, 1968. In any conflict among three such hypothetical employees, the Indianapolis Union worker loses. On the other hand, if the track in question were previously owned by the Indianapolis Union Railroad, the IU employee would have whatever seniority he had on the old Indianapolis Union seniority roster, and the hypothetical Pennsylvania and New York Central alumni would both have only April 1, 1976 seniority. Under this latter hypothetical scenario, it is the Indianapolis Union man who should win. At oral argument, the Union asserted that this would indeed be the case. If the seniority conflict involves consolidated "yard" jobs, prior ownership of the facility is apparently irrelevant and the amount of work contributed by each carrier determines the number of jobs allocated to that line's employees. Employees from a line which contributed little work would have fewer slots on the selection list, and thus a trainman from that line might have lower job priority than a former employee of the more heavily used yard who had a later date of hire. Even if, as seems to be the case in Indianapolis, several merging lines contributed equal amounts of work, and thus obtained equal numbers of slots, the distribution of dates of hire within each prior seniority roster could lead to situations in which an employee on one line with a later date of hire takes precedence over an employee from another line with an earlier date of hire.

Plaintiffs' Amended Complaint lists several pages of instances in which a former Indianapolis Union employee is bumped by, or furloughed in favor of, a former Penn Central employee with a later date of hire. These examples may apply to our first hypothetical—Indianapolis Union employees seeking to compete for work on track formerly owned by the Penn Central. The Complaint gives us no information on this point, but at oral argument plaintiffs claimed, contrary to our hypothesis, that all instances involved jobs on former Indianapolis Union

lines. It may well be that these are yard jobs. (No one has explained to us what portion of the old Indianapolis Union Railroad is "road" and how much "yard.") The Complaint also asserts that the desirable "long pool" jobs (e.g., Indianapolis to St. Louis, a prior Penn Central route) are awarded to Penn Central employees with later dates of hire. Because IU employees would have no prior right seniority on the track involved, this result is consistent with a territory-specific system of prior right seniority. At oral argument plaintiffs additionally claimed that the IU lines have been removed from service (although the date of this development has not been indicated), so the sole seniority date applicable to former IU employees is April 1, 1976. We presume this is a reference to road jobs.

B. The ICC Orders

Section 5(2)(f) of the ICC Act, 49 U.S.C. § 5(2)f, since amended and recodified at 49 U.S.C. § 11347 (1978), provides that a rail merger will not be approved by the ICC unless "a fair and equitable arrangement to protect the interests of the railroad employees affected" (emphasis added) is made. Accordingly, labor protective conditions were an important aspect of the planning begun in the early 1960's for the eventual merger of the New York Central into the Pennsylvania.[9] A May 20, 1964 agreement negotiated by the two merger applicants and 23 unions representing 75% of their employees required job retention without diminution or impairment of compensation, working conditions, or fringe benefits (essentially the conditions of the 1936 Washington Job Protection Agreement); further, the Penn Central would have only limited freedom to reduce the work force, and,

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[9] The formation of Conrail was not a merger pursuant to Section 5(2) of the ICC Act. Rather, it was created by independent legislation, the 3R Act. ICC orders governing labor protective conditions of the Penn Central merger are not applicable to Conrail.

while the merged company could transfer work throughout its system, it had to pay severance allowances to any workers who chose not to move.

An ICC Order dated April 6, 1966, 327 I.C.C. 475, which authorized the Penn Central merger (the "merger report"), adopted these 1964 labor protective conditions [10] and made them applicable to Pennsylvania and New York Central employees who had not been represented in the 1964 negotiations and to employees of other carriers which the ICC might subsequently require to be included in the merger. Plaintiffs, who were not involved in the Penn Central merger, had of course not been represented. After the February 1, 1968 merger, various labor organizations sought to have the labor protective conditions extended to employees of the subsidiaries of the Penn Central.[11] The case proceeded (despite the Penn Central's 1970 petition for reorganization under section 77 of the Bankruptcy Act) and in 1971 an Administrative Law Judge recommended that all the subsidiaries be covered by the 1964 merger protective conditions incorporated in the merger report. Exceptions were filed by the trustees of the Penn Central and by numerous labor organizations (including the UTU) and subsidiaries (not including the Indianapolis Union). On October 18, 1974 the ICC issued

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[10] It should be noted that these labor protective conditions set forth the rights of the employees *vis-a-vis* the railroad, not *vis-a-vis* one another. While section 5(2)(f) has been held to require a fair seniority consolidation system, *see Anderson v. United Transportation Union*, 557 F.2d 165 (8th Cir. 1977), relative position on a consolidated seniority roster is primarily a problem of priority among employees once the union and employer have determined the total number and type of jobs available and is not directly addressed by these labor protective orders.

[11] The New York Central and the Pennsylvania each had a number of subsidiaries which, like the Indianapolis Union, had become subsidiaries of the Penn Central. Conrail's brief asserts that there are 57 such subsidiaries.

the Order, Finance Docket No. 21898, 347 I.C.C. 536, that is the focus of plaintiffs' lawsuit.

Two classes of subsidiaries were considered in the 1974 order: those which had become integral operating units of the Penn Central system and those (including the Indianapolis Union) that continued to operate as independent railroads after the merger albeit under the legal ownership of the Penn Central. There was general agreement that the former group of subsidiaries, being involved in and directly affected by the merger, were entitled to the same job protections as New York Central and Pennsylvania employees; the only dispute concerned the "independent" subsidiaries.

The order is clear enough in its statement of policy. The Commission began with the premise that to be entitled to the protections of 5(2)(f), an employee need only meet two criteria: he must be an employee of some railroad engaged in common carriage, and must be affected by the merger in question. Protection is not limited to employees of the carriers directly involved in the merger, but applies to all railroad employees affected. Since there is usually little difficulty determining whether or not an individual is an employee of a common carrier, the only real question is whether he has been "touched sufficiently" by the transaction. 347 I.C.C. at 546, citing *Railway Labor Executives' Association v. United States*, 216 F. Supp. 101 (1963). Under this standard, the employees of the independent subsidiaries were eligible for 5(2)(f) protection.

The order was considerably less clear about how this statement of entitlement might translate into benefits for individual employees. The order stated only that "retroactive and prospective application of the merger report conditions to some of the employees of the subsidiaries" would be required. 347 I.C.C. at 551. Presumably this is a reference to "affected" employees. The order pro-

vided no guidelines for determining when an employee is to be deemed sufficiently "affected."

The trustees of the Penn Central promptly asked for reconsideration, arguing that the labor protective conditions were negotiated in the context of the Penn Central merger and should not be read to require employment guarantees and severance benefits for railroad workers who were not operationally part of the Penn Central system. The Commission responded, by order dated April 10, 1975, that the trustees had misunderstood the prior order, which held that employees of the subsidiaries "are entitled to benefits under the § 5(2)(f) labor conditions . . . only in those instances where they are shown to be directly and adversely affected by the merger" of the New York Central into the Pennsylvania, and that whether an employee was indeed so affected was to be determined by arbitration. This is apparently a reference to compulsory arbitration before the National Railroad Adjustment Board.

IV. *The Merits*

With this background in mind, we turn now to plaintiffs' specific claims.

A. The ICC Enforcement Claim

At oral argument, members of the panel repeatedly asked why plaintiffs thought that the arbitration requirement of the 1975 order did not apply to them. The answer was that there was nothing to be determined by arbitration because the 1974 order itself, and of its own force, gave plaintiffs the February 1, 1968 seniority date they sought, and their only problem was in obtaining enforcement of that 1974 order.

It appears to us that much of the confusion in this case has arisen because the parties are concentrating on very different aspects of the 1974 order (as modified by the 1975 order), and consequently neither side is really ad-

dressing the arguments raised by the other. We conclude that the orders provide that, if plaintiffs are "affected" by the merger of the New York Central into the Pennsylvania (a matter to be determined by arbitration), they are entitled to the protections specified in the 1966 merger report. This also is how defendants read the orders. These section 5(2)(f) protections include the preservation of jobs, wages, and fringe benefits that might otherwise be lost in the course of a merger. However, as we have already observed, *supra* n. 10, merger protective conditions, which circumscribe the carrier's ability to reduce labor costs, have little to do with seniority directly; that is a matter determined by a collective bargaining agreement, which determines which employees are entitled to the available jobs.

Given that plaintiffs are interested only in seniority, their lack of interest in arbitration proceedings designed to determine their right to 5(2)(f) protections makes a certain amount of sense; they are not arguing about merger protection, the ostensible subject matter of the ICC orders. Rather, they have focused on the language stating that employees of the subsidiaries are to be considered employees of the Pennsylvania, and they have built their case for Pennsylvania seniority on this language. Specifically, they argue that by referring to them as Pennsylvania employees, the ICC ordered that plaintiffs were to be considered Pennsylvania employees for purposes of collective bargaining over seniority rights. That is, the 1974 order meant that in 1975 the IU employees should have been integrated into the Penn Central seniority rosters (with Pennsylvania employee 1968 seniority) before the Conrail seniority list was created. Defendants were allegedly derelict in failing to recognize plaintiffs' entitlement to Pennsylvania employee status at the time of the 1975 collective bargaining agreement.

We think this is a rather strong implication to be derived from the use of the word "employee" in the 1974

order. We have no idea whether the 1974 order can properly be construed in this fashion. We therefore cannot act to enforce the 1974 order so construed until we know unambiguously what rights the order accords plaintiffs and whether the order has indeed been violated. That is the sort of determination (involving an extremely complex ICC-supervised merger) classically committed to agency discretion under the doctrine of primary jurisdiction. *See Far East Conference v. United States*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952); *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907). We therefore approve the district court's decision to decline jurisdiction at this time and to dismiss the complaint against both the Union and Conrail insofar as the complaint is construed as a suit for enforcement of the 1974 order interpreted as an automatic award of February 1, 1968 seniority. To determine whether the 1974 order grants them the right to Pennsylvania employee seniority status, plaintiffs may petition the ICC for a declaratory order. After the ICC has clarified plaintiffs' rights, a suit in federal court to enforce the order may be entirely proper.[12] The primary jurisdiction doctrine simply defers court consideration until the administrative agency has had an opportunity to evaluate the claim.

In view of our holding that this lawsuit cannot properly be construed now as one for the enforcement of an ICC order, we do not need to decide whether, for an action predicated on 28 U.S.C. § 1336, the United States must be a party by virtue of the Urgent Deficiencies Act or whether, under our decision in *Carothers v. Western*

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[12] We note that the district court was not requested to, nor did it elect to, follow the apparent option of referring the question to the ICC for determination. In such cases, the district court referring the question then has exclusive jurisdiction over civil actions arising from the new ICC order. *See* 28 U.S.C. § 1336(b). We express no opinion as to whether the jurisdictional posture of the case would have brought § 1336 into play.

Transportation Co., 554 F.2d 799, *reh. denied*, 563 F.2d 311 (7th Cir.1977), the United States need not be involved. It is enough here to point out that the United States is, of course, not a required party when the case, under the doctrine of primary jurisdiction, is referred for adjudication to an agency of the United States.

If plaintiffs do not wish to pursue their argument that the 1974 order entitles them to February 1, 1968 seniority, they may wish to determine what rights to merger protection they do have under the 1974 and 1975 orders. For this they must seek arbitration before the Adjustment Board. It is not immediately obvious why the Indianapolis Union employees would be considered *directly* affected by the Penn Central merger; if the Penn Central had not collapsed, the IU would presumably have continued to operate independently, and plaintiffs would have had no reason to seek relief under the 1974 ICC order. Plaintiffs' problems arise *directly* from the formation of Conrail, so it is only at one step removed that the Penn Central merger can be said to be relevant to them; "but for" that merger and accompanying seniority consolidation, workers with whom plaintiffs now compete would not have obtained February 1, 1968 seniority. It is not even clear to us that plaintiffs have adequately alleged "but for" causation. The real problem seems to be that, while all employees gained Conrail seniority (throughout their new consolidated seniority district) effective April 1, 1976, prior right seniority is territory-specific. Given that such a seniority consolidation plan was adopted, any merger between the IU and a larger railroad would have left the IU employees with a seniority disadvantage throughout the majority of the lines in the resulting system—unless the boundaries of the new seniority district were carefully selected to encompass equal amounts of territory from the larger and the smaller railroad, and that, of course, is not the case here.

It is conceivable that the Penn Central merger itself did have an *indirect* effect on plaintiffs in that New York Central and Pennsylvania employees, who retained "prior prior right" seniority on their own lines thereby obtained February 1, 1968 "prior right" seniority on each other's lines; the IU employees had no such opportunity to expand their seniority territory prior to the formation of Conrail. We do not know whether such retrospective "but for" causality amounts to the IU employees being "affected" by the merger of the Penn Central within the meaning of Section 5(2)(f) of the ICC Act and the 1974 and 1975 ICC orders, but plaintiffs are certainly entitled to go to arbitration to find out.

B. The Duty of Fair Representation Claim

The duty of fair representation claim against the UTU at least states a claim more amenable to resolution in the first instance by a federal court. Plaintiffs have made several different allegations that can collectively be characterized as alleged breaches of the duty of fair representation: Paragraph 28 of the Third Amended Complaint refers to the Union's failure "to act in good faith as a collective bargaining agent" and failure to give plaintiffs "fair representation in negotiating their seniority rights with Defendant Conrail." [13] Paragraph 27 al-

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[13] In addition, ¶ 28 alleges that Conrail "did not act in good faith" because it failed to follow Sections 4 and 5 of the 3R Act and the various ICC Orders. We have already approved the dismissal of the claim concerning the 3R Act, *supra* n. 4, and have concluded, *supra* n. 9, that the labor protective provisions of the 1974 ICC order are not applicable to Conrail. Insofar as the complaint can be construed as alleging that Conrail has some common law duty to act in good faith to protect plaintiffs' interests, we approve the dismissal of this claim. An employer's duty in labor negotiations is to protect its own interests (within the limits of the law). *Harrison v. United Transportation Union*, 530 F.2d 558, 561 (4th Cir. 1975), *cert. denied*, 425 U.S. 958, 96 S.Ct. 1739, 48 L.Ed.2d 203 (1976). We similarly conclude that an allegation that

leges that in giving IU employees April 1, 1976 seniority and Penn Central employees February 1, 1968 seniority, the Union was in violation of both the ICC Act and the duty of fair representation. At oral argument, plaintiffs asserted that the IU lines no longer exist, and this appears implicitly to state a claim that the Union acqui-

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Conrail acted "in concert" with the Union fails to state a claim. We believe that to be liable on a "concerted" denial of fair representation theory, Conrail would have had knowingly to have assisted the Union in a breach of its duty. This is not alleged. *See O'Mara v. Erie Lackawanna R. Co.*, 407 F.2d 674 (2d Cir. 1969), *aff'd sub nom. Czosek v. O'Mara*, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970) (because carrier was not alleged to be implicated in the union's breach of duty, the complaint against the carrier was properly dismissed, and any recourse against carrier was before National Railroad Adjustment Board).

Conrail also argues on appeal (the point was not dealt with by the district court) that plaintiffs' claim for reformation of the seniority roster should be dismissed because the claim is a "minor dispute" subject to the exclusive jurisdiction of the National Railroad Adjustment Board. *See* 45 U.S.C. § 153(i). We disagree. A minor dispute is one concerning the interpretation or application of the terms of a collective bargaining agreement. *See, e.g., United Transportation Union v. Baker*, 499 F.2d 727 (7th Cir.), *cert. denied*, 419 U.S. 839, 95 S.Ct. 69, 42 L.Ed.2d 66 (1974) (whether a computer print-out could be substituted for the "crewboard" required by the collective bargaining agreement); *Slagley v. Illinois Central R. Co.*, 397 F.2d 546 (7th Cir. 1968) (whether injured conductor was properly deprived of seniority rights upon transfer to less arduous job). The case before us does not involve a dispute over the meaning of the collective bargaining agreement between the UTU and Conrail, it is perfectly clear to all concerned that under the agreement, plaintiffs' seniority throughout the vast majority of the territory of Seniority District B is April 1, 1976, while former Pennsylvania and New York Central employees have seniority at least as far back as February 1, 1968 throughout the same territory. What plaintiffs object to is the fact that the collective bargaining agreement establishes this result. (This "minor dispute" issue is somewhat academic in view of the fact that we have already dismissed on other grounds all of the claims against Conrail.)

esced in wiping out plaintiffs' only prior right seniority territory.

A complaint should be dismissed on the pleadings only if "it appears that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). As we noted above, we do not know what seniority rights, if any, the 1974 ICC order accords plaintiffs, and they have not gone to arbitration to determine whether they are "affected" by the Penn Central merger within the meaning of the 1974 and 1975 ICC orders. It necessarily follows that plaintiffs could not at present state a claim for breach of the duty of fair representation if the only allegation were that the Union failed to apply the ICC orders as plaintiffs interpret them.[14]

It is, however, entirely possible that plaintiffs could prove that the Union discriminated against them in agreeing to a seniority consolidation plan that left employees of a very small railroad as low men on the resulting totem pole or did not attempt to alter the seniority system once the IU lines were abolished.[15] Plaintiffs have adequately alleged hostile discrimination against them. We accordingly disapprove this much of the district

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[14] If the ICC confirms plaintiffs' interpretation of the 1974 order, plaintiffs might still not have a duty of fair representation claim based on application of the 1974 order; the Union would likely not be liable for failing to give the order an interpretation that we are unable to give the 1974 order on its face.

[15] On a motion to dismiss, the well-pleaded allegations of the complaint are to be taken as true. Information mentioned in memoranda filed before the district court, and asserted before this court for the first time at oral argument, is neither well-pleaded nor part of the complaint. However, in the hopes of bringing this litigation to a conclusion, and in the interests of making sense of this confusing complaint, we will assume the truth of this allegation.

court's dismissal of the breach of duty of fair representation claim.

This decision does not, however, dispose of the question of who should decide the duty of fair representation case. The Eighth Circuit, in *Augspurger v. Brotherhood of Locomotive Engineers*, 510 F.2d 853 (8th Cir.1975), was faced with a similar problem. Plaintiffs in that case were members of one of the Northern Pacific seniority districts involved in the Burlington Northern merger. They alleged that their union had violated its duty of fair representation by agreeing to a work equity seniority consolidation scheme. Their former district had had relatively little traffic; they would have been better off under a pure date of hire seniority integration plan. The district court had dismissed the complaint, holding that the fair representation doctrine does not apply to cases arising out of mergers. The Eighth Circuit rejected this reasoning, concluding that a proper fair representation case is an exception to the doctrine of primary jurisdiction, even in merger cases.[16] However, since plaintiffs had not adequately alleged intentional or hostile conduct on the part of the union, the court concluded that the claim really dealt only with the conditions of the merger and affirmed the dismissal on primary jurisdiction grounds.

Defendant UTU argues that *Augspurger* is exactly on point and that the IU employees' fair representation claim should be dismissed on grounds of primary juris-

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[16] The court cited this circuit's decision in *Oling v. Airline Pilots Association*, 346 F.2d 270 (7th Cir. 1965), as holding that the Seventh Circuit is unwilling to recognize a fair representation exception to the primary jurisdiction doctrine in merger cases. We do not consider that to be a fair reading of *Oling*. The only issue on appeal there was whether plaintiffs, who did not appeal a Civil Aeronautics Board decision consolidating seniority rosters, could collaterally attack the C.A.B. decision by filing an independent suit in federal district court.

diction. We disagree. Plaintiffs complain that in negotiating seniority rights, their union deliberately discriminated against employees of a small railroad in order to benefit the larger Penn Central constituency. They also allege that they have essentially no seniority standing because of the abandonment of the Indianapolis track and lack Conrail seniority sufficient to bid for long pool jobs. These claims adequately (although inartfully) state a fair representation claim.

We therefore remand this issue for further proceedings.[17] We do note, however, that the district court may well determine that even this duty of fair representation claim cannot be resolved without referring some or all issues in the case to the ICC under the primary jurisdiction doctrine. Plaintiffs' allegations are so vague that it may develop that all issues are inextricably entwined with matters properly decided by the ICC.[18]

C. The Claim Under § 504(b) of the 3R Act

Plaintiffs argue that section 504(b) of the 3R Act, 45 U.S.C. § 774(b) (in effect at all times pertinent to this litigation, although repealed August 13, 1981), required that negotiations concerning seniority consolidation be conducted with individual union locals. Conrail and the UTU therefore allegedly erred in negotiating a single system-wide implementing agreement (the December 18, 1975 Agreement) establishing the Conrail seniority districts.

Plaintiffs' sole support for this argument is an unreported decision, *Maloof v. United Transportation Union*, No. 78-3797 (E.D.Pa.1980), which dealt with § 504(d),

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[17] On remand it will be necessary to determine whether all 126 plaintiffs were indeed represented by the UTU at the times in question.

[18] In this event, the district court could appropriately enter an order staying proceedings until the ICC reaches a determination.

not § 504(b) (the section relevant to seniority consolidation). *Maloof* held that Section 504(d), which refers to "collective bargaining agreements" for pay rates, work rules and work conditions, did not require a single system-wide agreement. In reaching this decision, the *Maloof* court specifically contrasted the language of 504(d), and its reference to "agreements" (plural), with the language of 504(b), which requires a "single implementing agreement." Even assuming that *Maloof* is the last word on the meaning of 504(d),[19] *Maloof* is thus itself an argument against plaintiffs' position on 504(b). In the absence of any case law supporting local seniority negotiation or any suggestion as to how Conrail could operate with a variety of seniority rosters that failed to mesh throughout a consolidated district, we must reject plaintiffs' argument. We approve the district court's dismissal of this count for failure to state a claim.

V. *Conclusions*

Plaintiffs will have to decide what they wish to do next in light of the options set forth in this opinion. If they want to pursue their interpretation of the 1974 ICC order, they must go to the ICC under the primary jurisdiction doctrine to obtain a clarification resulting in an enforceable order. If they want to determine their rights as employees "affected" by the merger of the Penn Central in accordance with the 1975 ICC order, they should go to arbitration. If they want to litigate their fair representation claim against the Union, they may do so on remand.[20] Whatever course plaintiffs select, we strongly

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[19] By an Act of October 14, 1980, Congress amended 504(d) to replace "collective bargaining agreements" with "single collective bargaining agreement."

[20] We do note, however, that if plaintiffs do not raise all of their fair representation claims now, res judicata may bar a subsequent suit raising additional such claims. Plaintiffs may therefore first want a decision from the ICC in order to determine whether they

suggest that they try a more coherent presentation of their case; this court has struggled to fill the gaps in plaintiffs' arguments—an effort which should not be demanded of it.

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have a viable fair representation claim against the Union for failure to apply the 1974 ICC order as plaintiffs interpret it.

[Service Date May 13, 1986]

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 21989

PENNSYLVANIA RALIROAD COMPANY—MERGER—
NEW YORK CENTRAL RAILROAD COMPANY

IN THE MATTER OF LARRY ZAPP, *et al.*—
PETITION FOR DECLARATORY ORDER

Decided: May 6, 1986

By petition filed November 23, 1984, Larry Zapp, *et al.*, 126 engineers and trainmen formerly employed by the Indianapolis Union Railway Company (IU), a wholly-owned subsidiary of the former Pennsylvania Railroad Company (Pennsylvania), seek reopening and/or a declaratory order setting forth the rights of these IU employees arising out of the merger. Comments in reply were submitted by Consolidated Rail Corporation (Conrail) and the United Transportation Union (UTU).

The petition was prompted by the decision in *Zapp* v. *United Transportation Union*, 727 F.2d 617 (7th Cir. 1984) (*Zapp*). Based on the doctrine of primary jurisdiction, the court suggested that these parties seek a declaratory ruling from this Commission to interpret the

meaning of the sixth supplemental report issued by the Commission in *Pennsylvania R. Co.-Merger-New York Central R. Co.*, 347 I.C.C. 536 (1974) (*Sixth Supplemental Report*), as it relates to the seniority rights of the IU employees.

BACKGROUND

In *Pennsylvania R. Co.-Merger-New York Central R. Co.*, 327 I.C.C. 475 (1966) (*Merger Report*), we approved the merger of the New York Central Railroad Company (Central) into the Pennsylvania under the provisions of former section 5(2) of the Interstate Commerce Act. The resulting entity became known as the Penn Central Transportation Company (Penn Central). Consistent with the requirements of former section 5(2)(f) [1] to provide "a fair and equitable arrangement to protect the interests of railroad employees affected," we conditioned our approval of the merger by, in effect, adopting an agreement entered into on May 20, 1964, between the merger applicants and 23 labor organizations representing approximately 75 percent of merger applicants' railway employees. The adopted agreement dealt with the protection of those employees represented by the labor signatories who might be adversely affected by the merger. The agreement provided, *inter alia*, for the retention of all employees willing to accept employment without their "being placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during employment." [2] We also concluded that affected employees not represented by a labor signatory be afforded the same protection as that extended to employees covered by the agreement. *Merger Report, supra*, 545, 552. The transactions authorized in the *Merger Report* were consummated on February 1, 1968.

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[1] Recodified at 49 U.S.C. 11347.

[2] The subject of employee conditions was dealt with in the *Merger Report, supra*, pp. 543-546.

Implementing agreements dated December 21, 1966 and November 16, 1967, governing the seniority rights of Pennsylvania and Central employees after the date of the merger, were entered by the merger applicants and labor representatives. The effect of these agreements was to establish Penn Central seniority districts arranged so that employees in the new districts would retain prior rights to employment on their former tracks. The area served by IU was incorporated within Penn Central Seniority District No. 2. Pennsylvania and Central employees within Penn Central Seniority District No. 2 were also granted a seniority date of February 1, 1968 throughout this district, thus extending their job protection beyond their former seniority district. Because IU was not directly involved in the Penn Central merger, IU employees were not represented at the negotiations that produced the December 21, 1966 and November 16, 1967 agreements, and no provision for seniority rights in the district was made for them. As a further consequence, IU employees obtained no seniority rights for parts of the Penn Central system not owned and operated by IU.

The applicability of the conditions for the protection of employees imposed in the *Merger Report* to employees of the railroad subsidiaries and affiliates of Penn Central such as IU was the subject of the *Sixth Supplemental Report*. In that decision, employees of the subsidiaries were acknowledged by the Commission to be railroad employees entitled to the same protection as employees of the parent railroads.[3] The Commission concluded that "em-

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[3] The *Sixth Supplemental Report* was served November 6, 1974. It was supplemented by a clarifying order served April 9, 1975, issued in response to assertions contained in a complaint filed by the Trustees of the Penn Central that the Commission had afforded the benefits of the labor protective conditions to employees of the subsidiaries without regard to whether these employees were affected by the merger. The clarifying order indicated that the Trustees had misunderstood our decision in this regard. We reiterated our previously-stated position that only employees actually

ployees of the two merging carriers . . . are entitled, *ab initio*, to the protection afforded by the conditions prescribed in the merger report, regardless of whether the employees were on the rolls of the involved systems or on those of their respective subsidiaries." The Commission further stated that "[t]hese subsidiary employees have . . . been entitled to the protection of the merger report conditions since the merger . . . as unrepresented employees." *Sixth Supplemental Report, supra*, 548-549.

No effort to consider the effect of the *Sixth Supplemental Report* on the earlier-negotiated implementing agreements was undertaken by the involved railroads or labor unions. As a result, the seniority status of the IU employees with respect to other Penn Central employees remained unchanged.

On April 1, 1976, as a consequence of the Penn Central bankruptcy, most of the assets and operating responsibilities of the Penn Central railroad system, including the IU, were acquired by Conrail.[4] Prior to its acquisition of Penn Central, Conrail entered into implementing agreements dated July 23, 1975, and December 18, 1975, with various Penn Central employee union representatives.[5] Under these agreements, employees of the acquired lines would be offered employment with Conrail and would retain seniority rights then held.[6]

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affected by the merger were entitled to protection, and in an effort to avoid any future misunderstanding we directed that the *Sixth Supplemental Report* be supplemented to provide specifically that employees of the rail subsidiaries are entitled to the benefits of the labor conditions only where they are shown to be directly and adversely affected by the merger.

[4] This acquisition was accomplished under implementing legislation contained in the Regional Rail Reorganization Act of 1973 and the Railroad Revitalization and Regulatory Reform Act of 1976.

[5] IU employees were represented in the negotiations which produced these agreements.

[6] The effect of the implementing agreements with Conrail was to provide to all employees of the lines acquired from the Penn Cen-

As IU employees were never covered under the 1966 and 1967 implementing agreements when Central merged into Pennsylvania, they were not given seniority dates for determining seniority rights at that time. The 1975 implementing agreements executed prior to the Conrail acquisition failed to recognize that IU employees had never received the earlier seniority dates in connection with the Penn-Central merger. This, allegedly, put IU employees at a disadvantage compared to former Pennsylvania and Central personnel directly employed by those carriers.

Consequently, petitioners on July 12, 1977, instituted a complaint action in the United States District Court for the Southern District of Indiana (No. I.P. 77-425-C) against the UTU and Conrail, alleging, *inter alia*, violation of the *Sixth Supplemental Report* in failing to protect the rights of employees of subsidiaries of railroads involved in the Penn Central merger. The district court dismissed petitioners' claims, and a subsequent appeal to the 7th Circuit was filed. The decision in *Zapp, supra*, which affirmed in part, reversed in part, and remanded the matter to the district court for further proceedings was the result of that appeal. The court in *Zapp* stated at 625:

> We therefore approve the district court's decision to decline jurisdiction at this time and to dismiss the complaint against both the union and Conrail insofar as the complaint is construed as a suit for enforce-

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tral system (including the IU employees) a basic seniority date of April 1, 1976. The December 18, 1975 agreement provided for the creation of a series of Conrail seniority districts, including District B Southwestern, which encompassed all of former Penn Central District No. 2. Within Conrail District B Southwestern, former Pennsylvania and Central employees retained the February 1, 1968 seniority rights previously held by them in Penn Central District No. 2 while former IU employees (who previously held no seniority rights in Penn Central District No. 2) acquired only the April 1, 1976 seniority date, except for IU track. Former IU employees retained their prior seniority rights in IU territory.

ment of the 1974 order interpreted as an automatic award of February 1, 1968 seniority. To determine whether the 1974 order grants them the right to Pennsylvania employee seniority status, plaintiffs may petition the ICC for a declaratory order. After the ICC has clarified plaintiff's rights, a suit in federal court to enforce the order may be entirely proper.

PRELIMINARY MATTER

Because of the long history and complexity of this proceeding, petitioners request that the matter be set for oral hearing to elaborate upon the issues and allow for cross-examination. The subject petition was submitted to the Commission at the suggestion of a court for the purpose of securing a Commission interpretation of a relatively narrow question involving the meaning of a prior Commission decision. As there are no questions of fact that cannot be resolved on this written record, no useful purpose would be served for setting the matter for oral hearing. The request for oral hearing is denied.

DISCUSSION AND CONCLUSIONS

Petitioners request reopening of the Penn Central merger and/or the issuance of a declaratory order. The petition for reopening must be denied. Other than the request in the opening paragraph of the petition, no facts or arguments were submitted to support reopening of the merger. The transaction was consummated in 1968, and created a rail carrier that no longer exists. Petitioners have not presented assertions of material error, new evidence, or substantially changed circumstances that are necessary to support reopening an administratively final action of the Commission. *See* 49 U.S.C. 10327(g)(1) and 49 C.F.R. 1115.4. More importantly, reopening is unnecessary to resolve the question the court suggested should be answered here.

Turning to the declaratory order, petitioners request the issuance of an order setting forth the rights acquired by them in the Penn Central merger as well as specific findings on certain contentions. The specific findings requested are reproduced in the appendix. Consideration of a petition for declaratory order is a matter solely within the discretion of this Commission. Under 5 U.S.C. 554(e), we are authorized to issue a declaratory order to terminate a controversy or remove uncertainty.[7] The scope of the declaratory order sought by petitioners in both specific and general terms far exceeds the extent of the inquiry that the court in *Zapp* suggested and goes beyond the role we assume in labor-management disputes. In view of the uncertainty expressed by the court with regard to whether the *Sixth Supplemental Report* granted petitioners a specific right to Pennsylvania employee seniority status, we will exercise our discretion and grant the request for a declaratory order. The subject to be considered, however, will be limited to that suggested for our examination by the court in *Zapp*: the seniority status to be accorded petitioners under the merger. This requires only an analysis of the Commission's intentions at the time of the *Merger Report* and *Sixth Supplemental Report*. Since no facts are in dispute, we can resolve this matter without further submissions from the parties.

The *Merger Report* extended the benefits of the May 20, 1964 labor agreement to Pennsylvania and Central employees who were neither parties to nor represented by a signatory to the agreement. It contemplated the equitable consolidation and extension of seniority rosters and seniority districts under negotiated implementing agreements which made provision for the use of employees and

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[7] Section 554(e), which is part of the Administrative Procedure Act, states: "The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

the allocation and rearrangement of forces.[8] The method by which this was to be accomplished was not set by Commission directive, but rather through the collective bargaining process.

Since the *Sixth Supplemental Report* confirmed that the merger protections were applicable to the employees of subsidiary carriers, IU employees, being employees of a subsidiary carrier, were thus entitled to full and equal benefits of the merger protective conditions. *See Sixth Supplemental Report*, at 549, where the status of unrepresented employees is discussed, and at 553, where IU is listed as a carrier controlled by the Pennsylvania Railroad Company. Implicitly, IU employees were considered protected employees.

Although the benefits conferred on IU employees in the Sixth Supplemental Report included no specific directive with regard to their seniority status, it was contemplated, consistent with the Merger Report that the equitable consolidation and extension of seniority rosters and districts would be acomplished through negotiated implementing agreements. To date, this has not been done. However, the Sixth Supplemental Report made no attempt to establish the seniority structure or assess seniority dates for IU employees. Our role under former section 5(2)(f) is to require a fair and equitable arrangement for affected employees and to ensure that affected employees not be "in a worse position with respect to their employment" for four years from the transaction. This respon-

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[8] In describing the May 20, 1964 agreement, the *Merger Report* noted:

> The Company is free to transfer work throughout its system and employees will have the opportunity to move to places where new jobs are created; but transfer of employees across seniority lines will be within their craft on the basis of implementing agreements to be negotiated from time to time as provided for in the basic agreement. *Merger Report, supra*, 543.

sibility does not require nor has it been the intention of this Commission to displace collective bargaining as the appropriate vehicle for establishing seniority, or to displace arbitration as the proper means for determining whether an employee is affected by a transaction and the specific benefits accruing from that status. *See Zapp*, 727 F.2d at 624, 625 and the April 9, 1975 order.

We find that the *Sixth Supplemental Report*, while confirming that petitioners were entitled to benefits of the employee protective conditions imposed in the merger proceeding, was not directed to and did not determine petitioners' seniority status.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petition of the IU employees to the extent it seeks reopening of this proceeding is denied.

2. The petition of the IU employees for the issuance of a declaratory order is granted and a declaratory order proceeding is instituted under 5 U.S.C. 554(a) and the exercise of this Commission's sound discretion, for the purpose of making the above finding.

3. The proceeding is discontinued.

4. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley.

JAMES H. BAYNE
Secretary

[SEAL]

APPENDIX

Specific findings requested by Petitioners

1. That, in confirmation of the Commission's previous orders, the I.U. Employees, as a group, are Penn Central employees directly and adversely affected by the merger of the Pennsylvania and the New York Central and are thus entitled to benefits under former 49 U.S.C. § 5(2)(f) ("Section 5(2)(f)") and the Protective Conditions previously approved by the Commission in the *Merger Report.*

2. That equitable preservation of seniority rights in a railroad merger proceeding is a concern encompassed by the Protective Conditions and Section 5(2)(f) and subject to Commission jurisdiction.

3. That the I.U. Employees are and were automatically entitled by the Commission's previous orders to a Penn Central Seniority District No. 2 seniority date determined in the same manner applied with respect to similarly situated former Pennsylvania and New York Central employees.

4. That the Penn Central failed to notify any I.U. Employee that he was or would be affected in his employment as a result of the Penn Central merger.

5. That the I.U. Employee's monthly compensation guarantees with respect to the Penn Central merger have been and continue to be abrogated.

6. That the extent of injury or damage, if any, suffered by the individual I.U. Employees due to abrogation of their rights, including seniority rights, under Section 5(2)(f), as established in this proceeding, shall be arbitrated by the parties involved, namely the I.U. Employees; the UTU and any other collective bargaining representative that represented any I.U. Employee since December 21, 1966; and Conrail as successor to Penn

Central. Further, that the involved parties shall submit a plan of arbitration within thirty (30) days of a final Commission order in this matter, and if the parties are unable to do so within that time, the Commission, upon petition by any involved party, shall establish a method of arbitration.

LIST OF PARTIES

Richard D. Adams
Lynn Amick
James R. Andrews
John R. Bahr
Matt Bailey
Robert C. Bailey
Joseph W. Bailey
Steven W. Bailey
Charles O. Baker
Donald R. Barnard
J. J. Bauerle
Charles F. Bear
John J. Beck
William R. Becker
Jeffery J. Bell
Homer L. Bennett, Jr.
Donald E. Black
W. L. Booker
William Bowen
Louis E. Bowman
William J. Breeden
Raymond D. Brown
Ronnie J. Buchanan
Daniel L. Bushey
Hal D. Butler
John D. Case
Daniel R. Chrisman
Richard E. Clark
Ralph Edward Cook
Ralph Elmo Cook
L. J. Cooper
Raymond P. Coulson
Wallace Craven
P. J. Cronnon
Roy Davis
William D. Davis
Clarence W. Deeren
George M. Dobson
L. Dorn
Clyde H. Downing
Charles E. Draper
Willis C. Dunlop
Jack L. Durham
James E. Durham
Leeman Durham
Robert J. Dye, Jr.
Theodore C. Edwards
Lawrence I. Eggers
William T. Ehret
Gene L. Geist
William H. George
Stanley R. Glass
Edward L. Grimes
Everrett K. Grogg
Loy Hacker
Basil R. Hadley
Daniel P. Ham
William E. Ham
James O. Harper
Theodore S. Hatfield
M. R. Hatmaker
Wayne C. Hessong
Dwight Hinshaw
Monroe W. Hockman
Jesse House
Harry W. Irons
Robert J. Irvin
John M. Jaynes
Roy H. Jewell
George W. Joslin
Jimmy R. Jones
George Keller
Steve Kimbler
Albert D. Kingery
Glenn A. Lawson
John W. Lawson, Sr.
Robert Lawson
Richard M. Leslie
James K. Litzelman
Joseph P. Loney
Clifton A. Lyons
Donald J. Maris
Harry C. Masencale
Wayne McBurney
Billie Smith McCrady
John P. McGuire
Earl C. McKinney
Arvine G. Meadows
Scott L. Miller
Edward W. Miskowiec
John S. Miskowiec
Raymond Miskowiec
Darrell W. Mitchell
Danny L. Moore
James M. Moore
James W. Moore
Robert H. Morgan
Kenneth L. Morgenthaler
Nevelyn D. Myers
Elmer Napier
Ardell (George) Novak
James D. O'Connor
Carl Ogden
Gene E. Onstott
Russell H. Overstreet
Mick Parsons
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Frank W. Pluckebaum, Jr.
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Phillip J. Price
Clyde Rather
T. J. Ray
Raymond Reddy
William J. Reddy
James W. Richardson, Jr.
James W. Richardson, Sr.
Fred H. Rohde
Joseph Sabo
Henry A. Sanford
James A. Sanford
Kenneth W. Scott
Morris H. Shelton
Paul M. Shields
Herbert W. Smith
Paul L. Smith
Charles E. Spears
Milton R. Spears
Earl Stewart
Eugene A. Tansel
Robert H. Tempke
William E. Thomas
Lanice D. Thompson
Vaso S. Todor
Lew A. Townsend
Walter J. Troutman
Tennyson T. Turner
Richard E. True
John M. Wagaman
Thomas K. Wallsmith
Joseph R. Wente
James D. Whitaker
Ivan E. Whitlow
J. Eddie Whitney
James D. Williams
Larry V. Zapp